92-1301

No. _____

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1992

JULIAN R. YOUMANS,

Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Fourth Circuit violate the *Erie* Doctrine by substituting Massachusetts law for the laws of South Carolina, after having determined that South Carolina laws govern the duties of the parties, when ample South Carolina precedent was cited and when the Fourth Circuit failed to apply South Carolina state law resulting in the Fourth Circuit's reversing a $1.6 million jury verdict for the Petitioner?

II. Did the Fourth Circuit exceed its appellate authority and proper role by re-weighing the evidence and impermissibly substituting its findings of fact for the fully supported factual determinations of the jury?

LIST OF PARTIES

1. Julian R. Youmans[1], Petitioner.

2. The Prudential Insurance Company of America, Respondent.

3. Hospitality Associates, a South Carolina Limited Partnership.

4. Jeffrey Stoler.

5. Martin Hecht.

Petitioner believes, and hereby notifies the Clerk pursuant to Supreme Court Rule 12.4, that Hospitality Associates, a South Carolina Limited Partnership; Jeffrey Stoler; and Martin Hecht have no interest in the outcome of this petition.

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[1] Parties not listed on caption are as follows: JULIAN R. YOUMANS as Former Director and Liquidating Trustee of Francis Marion Hotel, Incorporated, a Dissolved South Carolina Corporation, and as successor to Francis Marion hotel, Incorporated, a Dissolved South Carolina Corporation; REED N. YOUMANS, as the Former Director and Liquidating Trustee of Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation; and FRANCIS MARION HOTEL, INC., a Dissolved South Carolina Corporation.

Julian Youmans is the real party in interest. He was the sole shareholder of Francis Marion Hotel, Incorporated and received the assets and rights of that company by assignment on February 25, 1985, and by operation of law due to the dissolution of the company on December 13, 1984. *See* South Carolina Code § 33-21-220. The remaining plaintiffs included all those who may have held an interest and/or cause of action for Youmans' benefit. Youmans will be referred throughout and without reference to whether he acted individually or through his corporate or Liquidating Trustee capacity, since these distinctions are not relevant.

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THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner seeks a Writ of Certiorari since the Fourth Circuit Panel's reversal of the District Court's denial of Judgment Notwithstanding the Verdict improperly applied Massachusetts law in place of South Carolina authority to the contrary which was never cited or distinguished by the Panel; and because the Panel improperly reweighed the facts, contrary to federal procedure and, in the process, plainly misread two key documents; all of which resulted in the reversal of the jury's factual findings and verdict.

CITATION TO REPORTED OPINIONS IN THE CASE

The decision of the United States Court of Appeals for the Fourth Circuit is reported, without published opinion, at 977 F.2d 575 (4th Cir. 1992). The full text is reproduced in Westlaw. The decision of the District Court is not reported.

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered September 28, 1992. The Order Denying the Petition for Rehearing and Suggestion for Rehearing In Banc was entered by the Court of Appeals on November 4, 1992. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

(1) *28 U.S.C.A. § 1652.* State laws as rules of decision. The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply.

(2) *U.S. CONST. amend. VII.* In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Summary of Facts

The Negotiations, Prudential Commitment and Sale. Petitioner, Julian R. Youmans ("Youmans"), owned the Francis Marion Hotel ("Hotel") in Charleston, South Carolina in the corporate form of Francis Marion Hotel, Inc. The 1984 sale of the Hotel for $11,050,000.00 was a three party negotiated transaction involving Youmans as sole stockholder and owner, Hospitality Associates of Charleston as ("Purchaser"), and Respondent, The Prudential Insurance Company of America ("Prudential") as lender. In the Purchase Agreement, Youmans agreed to act as a co-lender, and as such, agreed to finance $3,550,000 of the sale to be secured by a purchase money mortgage. The Purchaser sought and obtained mortgage financing of $6 Million from Prudential and the remaining funds were obtained from a limited partnership offering.

As a fundamental and necessary part of the sale, Youmans subordinated his Purchase Money Mortgages by taking second and third mortgages to the Prudential first mortgage. As an incentive for Youmans to subordinate his mortgages, Youmans obtained equally important rights from Prudential: (1) the right to cure any "monetary default" by the Purchaser on Prudential's mortgage within thirty (30) days of notice from Prudential; and (2) the right to foreclose his subordinated Purchase Money Mortgages without triggering the due on sale clause in the Prudential mortgage. Youmans' rights were fully negotiated and inserted in Prudential's Commitment

Letter Agreement ("Commitment"), in ¶9(e)(i) and (ii) for Youmans' benefit and protection.

These rights were made a part of Prudential's Loan Commitment contract on October 26, 1984. The rights granted to Youmans in the Commitment were critical to the transaction and once inserted into the Prudential Commitment, the pertinent page including the rights embodied in ¶9(e) of the Commitment was faxed to Youmans to demonstrate that Youmans' rights were included in Prudential's Commitment contract. The Purchase Agreement required that a complete copy of the Prudential Commitment embodying Youmans' rights as a third party beneficiary be furnished to Youmans at closing. It was understood by all the parties that as a necessary component of the sale Youmans was relying on Prudential's Commitment as its contract. Prudential's Commitment at ¶9(e) states:

> . . . *Prudential also agrees as follows*:
>
> (i) that, *in the event of a monetary default* under the Prudential first mortgage, *Prudential will allow* the second or third lienholder *the right to bring the first mortgage current within thirty (30) days of written demand* therefore by Prudential; and
>
> (ii) that, *in the event the second or third lienholder forecloses* or takes a deed in lieu of foreclosure, *such event will not cause an exercise by Prudential of its rights under the due on sale clause* contained in the Prudential first mortgage (Emphasis added.) (App. 41).

Significantly, Prudential's Commitment contains an integration clause:

> This Commitment constitutes the *entire agreement* between Applicant and Prudential and sets forth *all* the terms and conditions under which a *loan by Prudential shall be made* (Emphasis added.)(App. 28).

The parties closed this transaction on December 12, 1984. At no time did the parties intend to surrender Youmans' rights to notice and opportunity to cure which are contained in the Commitment.[1] The continued vitality of the Commitment is demonstrated by the fact that the only two documents to which all three parties to the transaction were signatories at closing specifically reference Prudential's obligations embodied in the Prudential Commitment. These Commitment obligations are referenced in the recital sections and in the contractual stipulation sections of each escrow agreement:[2]

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[1] Youmans' rights were unequivocal and never were required to be in any other documents. Had the parties thought it necessary that ¶9(e) be included in the first mortgage or any other document, the three parties would have provided for that as evidenced by the fact that the Commitment did provide for: (1) additional documents for insertion in the mortgage; and (2) specific provisions which were outlined in the Commitment for necessary inclusion in the mortgage (¶8, Special Mortgage Provisions . . . ; ¶21, Other Special Mortgage Provisions; ¶4; ¶6(a)-(i)); and (3) an additional side letter agreement limiting the liability of HAC Partnership which made the mortgage non-recourse, ¶20)(App. 41; 38-39; 46; 33-37; 44-46).

[2] The Panel committed plain error in failing to note that Prudential's obligations are also embodied in the contractual stipulation sections, as well as the recital sections. This is critical

> Whereas, Lender, pursuant to its Loan Commitment dated October 26, 1984, (the "Commitment") agreed to disburse the principal sum of six million ($6,000,000.00) Dollars ("the loan") . . . upon the terms and conditions set forth therein,. . . .)
>
> Now therefore, in consideration of the foregoing, of the mutual covenants and promises contained herein, *to induce seller to sell the Hotel* to Borrow [sic] and Lender to make the Loan to Borrower . . . *and intending to be legally bound hereby, the parties agree* as follows:
>
> 1. *Lender shall disburse to Borrower* the sum of six million ($6,000,000.00) Dollars upon or after compliance with *all the terms and conditions of the Commitment*. . . . (Emphasis added.) (App. 53-55).

The Ramada escrow repeats these provisions essentially verbatim, in both the recital section and contractual stipulations section (App. 60; 61-62).

The Prudential Mortgage. The Prudential mortgage which referenced other closing documents had no integration clause. The Prudential "form mortgage" had been contemplated for use in the transaction as required by the Prudential Commitment (App. 37). As such, the Prudential Commitment which included Youmans' rights, was never viewed by the parties as being in any way inconsistent with the Prudential mortgage. On the contrary, as mentioned previously, a copy of the Commitment was

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in that the Panel's decision was based on the erroneous conclusion that Youmans' rights were embodied only in the recital section; and therefore, not part of the contractual stipulations (App. 15).

required to be and was provided to Youmans as part of the closing documents.

Youmans' Mortgage Rights. In addition to Youmans' rights in the Prudential Commitment, Youmans' second and third mortgages provide a separate and independent protection which is contained in each of the cross-default provisions of Youmans' second and third mortgages which was to allow Youmans to foreclose based upon any default on Prudential's first mortgage "which is not cured within any applicable grace period."[3]

Also, ¶1.10 in Youmans' second and third mortgages gave Youmans the right to perform the Purchaser's defaulted obligations under the Prudential mortgage, and add those payments, including regular or accelerated payments, to his secured obligation.

The Default and Prudential's Plan. On October 31, 1985, 11 months after the sale, the Purchaser notified Prudential that it could not make the November 1, 1985 payment. Thereafter, the Purchaser failed to make the required monthly installments from November 1985 through June 1986 of which Prudential noted on their internal records as defaults (App. 68-73). However, Youmans was not made aware of these defaults and was continuing to receive information from the Purchaser indicating payments to Prudential were being made.

A meeting which specifically excluded Youmans convened on January 7, 1986, to discuss the defaulted Prudential first mortgage. Prudential representatives and the

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[3] Prudential accounting records provide that the Purchaser's loan had only a five day grace period.

Purchaser fully discussed the financial condition of the Hotel, Youmans secured obligations, and the seriousness of the situation. Prudential formulated a plan without Youmans' knowledge or consent that required the Purchaser to refinance with another lender to enable Prudential to get rid of the Purchasers' loan. In April 1986, about 17-18 months after the purchase of the Hotel, the Prudential plan was finalized, still without Youmans' knowledge or consent. Prudential recognized that the value of the property at that time was sufficient to cover its accumulating principal and interest, and Prudential also knew the property value was not sufficient to fully satisfy the debt to Youmans. Nevertheless, Prudential still did not provide Youmans with notice. In formulating the plan, Prudential undertook the role of business advisor setting forth a specific plan of action. Although the plan was in writing, it was never recorded in the RMC Office for Charleston County. Therefore, Youmans was still prevented from notice of the Purchaser's default. Additionally, the Purchaser was making regular monthly mortgage payments of $10,000 to Youmans while in default on the Prudential first mortgage. This payment which Prudential was aware of was to prevent Youmans from learning of the Purchaser's default on the Prudential mortgage.

Failure to Monitor. After formulating and implementing its plan, Prudential failed to monitor or enforce its obligations or those of the Purchaser. For example: (a) deadlines for payments were missed; (b) taxes and contingent interest went unpaid; (c) escrow accounts for replacing furniture and for general maintenance were depleted; (d) management fees, supposedly suspended for the duration of the plan,

were made to the Purchaser's company; and (e) repayments of the Purchaser's personal loans, forbidden under the plan, were nonetheless repaid. All of these diversions of money from the Hotel operation caused the Hotel to decrease in value and siphoned assets that would have gone to pay secured obligations. Further, the re-syndication and refinancing of the project which was the basis for the plan was also never monitored by Prudential. By January 1987, a year later, no capital was infused, and the Purchaser missed its monthly payment under the plan.

The failure to monitor its plan was compounded by deviations from Prudential's rules and regulations. For example, (1) no Prudential accountant participated in analyzing and approving the plan; (2) mandated reports to the Finance Committee were not made; (3) proper forms were not utilized once the loan was classified as a problem loan; (4) there was no identification of the escrow depletions or of the failure to fund tax and insurance escrows; (5) annual inspections were not undertaken, contrary to Prudential policy; (6) Prudential had noted the need to inspect the property in 1986, but no inspection took place; and, finally, (7) Prudential's policy provides that where an investment is found to be unacceptable due to, among other things, deterioration, "appropriate action *shall* be taken to protect the investment." Instead of taking action at the time of the defaulted obligations in 1985, Prudential allowed the Purchaser to divert money from secured obligations and general maintenance. The most damning evidence of the reckless failure to take action came from Prudential's head of hotel investments who, while speaking at a

seminar, recommended that lenders have a progressive policy dealing with defaulted loan payments, including a letter within thirty (30) days; a visit within sixty (60) days; and sitting down with counsel to "take action" within ninety (90) days. He admitted, however, that Prudential did not follow such procedures.

The FF&E. The Hotel furniture, fixtures and equipment (FF&E) were being leased by Youmans under lease purchase contracts, which required lease payments by him of approximately $30,000 per month. At the expiration of the lease terms, Youmans had the right to pay fixed sums and receive title to that personalty. As part of the sale transaction, Youmans agreed to continue making monthly lease payments and give the Purchaser the right to purchase the FF&E upon the expiration of the lease terms if the Purchaser fulfilled its other obligations to Youmans.

Since the sale in 1984, Youmans had continued to make the monthly lease payments for the FF&E at the Hotel, which as mentioned was approximately $30,000 per month. Following the Purchaser's initial defaults, Prudential sought and obtained a "side" security agreement with National Acceptance Corporation, the then owner and lessor of the FF&E. The security agreement was also never publicly filed, and Youmans was also never told of this agreement.

Youmans' Notice. On September 28, 1987, Prudential first notified Youmans of its intent to foreclose based upon the first mortgage defaults, which had been in existence for 22 months (since November 1985). When questioned why Prudential had not notified Youmans and requested the

payment of the Purchaser's defaulted obligations, Prudential's representatives maintained that " . . . we do not find any document that provides a specific right to cure a default on the first mortgage."[4] Although Prudential's vice president in charge of the Hotel loan admitted that Prudential would have been eager to allow the second lienholder to bring the loan current, " . . . just bring cash," he never considered notifying Youmans as part of a plan to see if Youmans was willing to cure any of the defaults. Prudential's perfunctory notice and offer to cure was made 22 months after the first default on the Prudential mortgage, and after Prudential representatives had concluded, in August, 1987, that any opportunity to cure given to lienholders, including Youmans, would not be realistically accepted because to reinstate the first mortgage to Youmans if he paid, as mentioned, totalled approximately $2 million.

Only three years previous to the notice, the Hotel had sold for over $11 million in December 1984 to the Purchaser. At the time of the initial defaults on the Prudential first mortgage which was 11 months after the sale, there was evidence that the Hotel was still worth between $10 million to $11 million. After Prudential commenced foreclosure, the Hotel was valued at $3.25 million. After foreclosure, Youmans received nothing for his second and third mortgages which he subordinated to Prudential's

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[4] Pursuant to internal operating procedures, Prudential's in-house legal department had the responsibility to establish systems for monitoring notice requirements for its mortgages. Yet, these systems failed to note Youmans' Commitment Letter rights, or his rights to perform defaulted obligations of Purchaser under the second and third mortgages.

mortgage in return for the right to notice and the opportunity to cure.

Thereafter, this action was filed in the District Court based on diversity of citizenship jurisdiction pursuant to 28 U.S.C. §1332. After a ten day trial before an eight member jury, the jury found that Prudential had breached its contract and was negligent and reckless in its actions, and rendered an award of actual and punitive damages against Prudential. Prudential did not contest the awards as unduly large or the product of passion and prejudice.

ARGUMENT

Reasons for Allowance of the Writ. The Fourth Circuit Panel ("Panel") erred in failing to follow South Carolina law in this diversity action, and instead applying Massachusetts law in violation of 28 U.S.C.A. §1652, and this Court's decision in *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938). The case under review epitomizes a departure from the accepted and usual course of judicial proceedings which calls for an exercise of this Court's power of supervision. The Fourth Circuit is bound by the decisions of the Supreme Court of South Carolina in this diversity action, and because there is persuasive evidence that the Supreme Court of South Carolina has a conflict with and would refuse to follow the Fourth Circuit's decision, this Court has cause to review the decision of the Panel. *See Six Company v. Highway Dist.*, 311 U.S. 180 (1940); *West v. American T & T Co.*, 311 U.S. 223 (1940); and *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940). A federal court sitting in diversity has a duty to apply the operative state

law as would the highest court of the state in which the suit was brought. *Liberty Mutual Ins. Co. v. Triangle Indus., Inc.*, 957 F.2d 1153, 1156 (4th Cir. 1992). The Fourth Circuit is simply not free to apply a different rule of law however desirable they may believe it to be. *West v. American T. & T Co.*, 311 U.S. at 238. The practical effect of the disputed decision defeats the twin aims of the Erie doctrine, ". . . discouragement of forum-shopping and avoidance of inequitable administration of the laws." *See, Hanna v. Plumer*, 380 U.S. 460 (1965). This case should be finally decided by the Supreme Court because the Panel's decision which is contrary to and in direct conflict with the operative laws of South Carolina, creates a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum.

In addition to the *Erie* violation, the Fourth Circuit exceeded their scope of authority and proper role in reviewing the facts as announced in *Lust v. Clark Equipment Co., Inc.*, 792 F.2d 436, 438 (4th Cir. 1986). The Youmans case deals with a clear case of the Fourth Circuit conducting a *de novo* weighing of the evidence, and impermissibly substituting its findings of fact for the fully supported factual determinations of the jury in violation of the Seventh Amendment. The Fourth Circuit's power of review is limited by the Seventh Amendment which provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States . . . [The Fourth Circuit] may not, therefore, weigh the evidence . . . or substitute [its] judgment of the facts for that of the jury . . . ." *Lust v. Clark Equip. Co., Inc.*, 792 F.2d 436, 437-438 (4th Cir. 1986), *quoting Tights, Inc. v.*

Acme-McCrary Corp., 541 F.2d 1047, 1055-56 (4th Cir. 1976). The consequences of the Panel's actions for other litigants are to abolish the Seventh Amendment right to a jury trial. Finally, the Panel committed plain error in basing its reversal of the jury verdict on a wholly erroneous interpretation of merger law, and more importantly, on wholly erroneous factual findings.

I. Erie Violations

Application of Massachusetts Law. In reversing the jury's finding of negligence, and in holding that "it is clear that [South Carolina recognizes] no general common law duty for superior mortgagees to refrain from extending time of payment for their mortgagors for the benefit of subordinate mortgagees," the Panel failed to ascertain and apply the operative state law of South Carolina. In violation of the *Erie* Doctrine, the Panel applied 1966 Massachusetts law, *Guleserian v. Fields*, 351 Mass. 238, 218 N.E.2d 397, 401-402 (1966) (App. 16). Regardless of however desirable the Panel may deem Massachusetts law, it is not free to apply this rule in substitution of operative South Carolina laws. *West*, 311 U.S. at 238.

Contrary to the Fourth Circuit's proclamations that South Carolina recognizes no general common law duties for which Prudential owes to Youmans, South Carolina imposes four common law duties which are applicable to Youmans' case and provide a basis for the jury to find a duty owed to Youmans and a breach thereof resulting in damages. First and foremost, the Supreme Court of South Carolina has provided that:

> As a matter of law, 'a lender and a borrower may not bilaterally make a material modification in the loan to which the seller has subordinated without the knowledge and consent of the seller to that modification, if the modification materially affects the seller's rights.'

Citizens & Southern National Bank of SC v. Smith, 277 S.C. 162, 284 S.E.2d 770, 772 (1981), citing with approval, *Gluskin v. Atlantic Savings & Loan Association*, 32 Cal.App.3rd 307, 322, 108 Cal.Rptr. 318, 323 (1973). Pursuant to *Citizens & Southern* and *Gluskin*, South Carolina law provides that the purchaser and lender (Prudential) may not bilaterally change the loan to which the seller (Youmans) has subordinated his interest, *without the consent of the seller* (Youmans). In the 1981 South Carolina Supreme Court case of *Citizens & Southern*, 284 S.E.2d at 772, the lender extended the time for payments on a mortgage by the purchaser/developer for one year without the knowledge of the seller. The project resulted in financial ruin and foreclosure. The court held that the action by the lender prejudiced the original vendor, and the lender's own actions resulted in a loss of its priority over the vendor's subordinated mortgage. The duties imposed in *Citizens & Southern*, as charged to the jury by the District Court, are applicable to Youmans' case and provided a firm basis for the jury to find a common law duty and breach in this case (App. 78).[5]

A second common law duty South Carolina imposes is founded upon Youmans and Prudential's relationship as co-lenders. In *American Realty Trust v. Chase Manhattan Bank, N.A.*, 222 Va. 392, 281 S.E.2d 825 (1981), cited with approval, in *Hope Petty Motors of Columbia, Inc. v. Hyatt*, Slip

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[5] The Panel neither cited nor distinguished this common law duty recognized by South Carolina.

Op. No. 1932 (S.C. Ct. App. filed December 22, 1992), the Virginia Supreme Court was called upon to interpret a "building loan agreement" entered into by two co-lenders. As in Youmans' case, one lender argued that, as a matter of law, it owed the other lender no fiduciary duty. The court disagreed stating:

> There can be no doubt that, from the building loan agreement, there arose a legal relationship between American and Chase as co-lenders. In this relationship, the parties . . . were both interested . . . in the same things – the security of their loan and the ultimate repayment of their financial investments. To protect these mutual interests, American and Chase owed each other a reciprocal duty founded in trust and confidence which, after all, are the foundation stones of a fiduciary relationship. *American Realty Trust*, 281 S.E.2d at 833.

A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscious, "is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). This duty also provides a basis for which the jury may have based its conclusions as Prudential was clearly bound by this duty of trust and confidence as a co-lender.[6]

The third common law duty South Carolina recognizes which is also applicable to Youmans' case is the duty to exercise reasonable care in giving information when the person has pecuniary interest in the transaction. *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577, 580 (1990);

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[6] The Panel neither cited nor distinguished this common law duty recognized by South Carolina.

Winburn v. Insurance Company of North America, 287 S.C. 435, 339 S.E.2d 142, 146 (Ct.App. 1985). Suppression of a material fact which one is duty bound to disclose is equivalent to a false misrepresentation. *Landvest Associates v. Owens*, 276 S.C. 22, 25, 274 S.E.2d 433, 434 (1981). The duty to disclose facts may fall under three classes: (1) where there is a pre-existing definite fiduciary relationship between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealing, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; and (3) those instances where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary, and necessarily calls for perfect good faith and full disclosure, without regard to any particular intention of the parties. *Holly Hill Lumber Co., Inc. v. McCoy*, 201 S.C. 427, 437, 23 S.E.2d 372, 376 (1942). The jury certainly may have based its decision on Prudential's breach of this duty.[7]

Finally, South Carolina recognizes that a course of dealing can create an independent duty in addition to any contractual duties. *Caldwell v. Jim Walters Homes, Inc.*, 293 S.C. 229, 359 S.E.2d 518 (Ct. App. 1987); *Roundtree Villas Association v. 4701 Kings Corp.*, 282 S.C. 415, 423, 321 S.E.2d 46, 51 (1984)(citing with approval Restatement (Second) of Torts § 323 *Negligent Performance of Undertaking to Render Services.* (A lender which assumed duties to repair shoddy construction at a failed condominium project, while not liable for the original construction defects, was responsible for defects in repairs which it undertook in order to promote sales); *See*

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[7] The Panel neither cited nor distinguished this common law duty recognized by South Carolina.

also, Restatement (Second) of Torts § 324(a) extending § 323 to protect third parties). When Prudential elected to devise a plan to divest itself of the Purchaser's defaulted loan, Prudential knew its actions could foreseeably have severe consequences on Youmans. As such, Prudential had a duty to act in manner so as not to injure Youmans which included the duty to monitor its plan to prevent harm to Youmans. Having assumed the duty of supervision of the purchaser and excluding Youmans from its plan, Prudential did not act reasonably and in regard to Youmans' interests so as to prevent injury and, as such, the jury may have based its conclusions on the breach of this duty.[8]

The Panel recognizes that South Carolina law is clear that if a person enters upon the performance of a contract, negligent performance (i.e., performing the duties in an improper manner), can result in negligence liability (App. 16-17). However, the Panel erred in failing to find an enforceable contract for Youmans' benefit which is addressed, next. (App. 17).

Failure to Apply Operative State Law. In reversing Youmans' jury verdict and entering JNOV in Prudential's favor on the contract claim as a matter of law, the Panel failed to apply the law of the highest court of the State within the requirement of 28 U.S.C.A. § 1652, and the Court's decision in *Erie Ry. Co. v. Tompkins,* 304 U.S. 64 (1938).

The Panel concluded that the controlling law is *Wilson v. Landstrom,* 281 S.C. 260, 315 S.E.2d 130 (Ct. App. 1984) a 1984 Appellate Court case which relies on *Charleston & Western Ry. Co. v. Joyce,* 231 S.C. 493, 99 S.E.2d 187 (1957). The Panel's

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[8] The Panel neither cited nor distinguished this common law duty recognized by South Carolina.

reliance is misplaced and in violation of *Erie* in that since 1957, the Supreme Court of South Carolina has developed a body of law applicable to multiple party transactions which result in many final documents, and as such, the Supreme Court of South Carolina has "given clear and persuasive indication that its pronouncement [of the application of merger law to multiple party transactions] has been modified, limited or restricted." *See West*, 311 U.S. at 183. Additionally, *Wilson* is not controlling as its facts are clearly distinguishable from the present case. *Wilson* involved a two party residential home sale resulting in a single document. Whereas, the present case is a three party sale resulting in many closing documents, and not just one. The facts in *Wilson* give rise to the inference that the sellers and purchasers exchange of the deed and second mortgage manifested an intent to merge all prior terms and negotiations. Whereas, in the present case, such an inference cannot be drawn. Also, much of the *Wilson* case revolves around actions taken on behalf of the seller under a power of attorney which the seller later sought to repudiate. Similar to *Wilson* is *Charleston & Western Carolina Ry. Co. v. Joyce*, 231 S.C. 493, 99 S.E.2d 187 (1957), wherein the court, faced with another two party dispute involving *differing versions* of an option agreement signed by the parties, simply found that the language which was later used in the deed transferring the property controlled what was intended to have been transferred.

The highest court of the state is the final arbiter of what is state law. *West*, 311 U.S. at 183. When it has spoken, its pronouncements are to be accepted by federal courts as defining state law, unless it has later given clear and persuasive indication that its pronouncement will be

modified, limited or restricted. *Id.* It is the duty of the federal court in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule. *Id. See, Erie,* 304 U.S. at 78; *Russell v. Todd,* 309 U.S. 280 (1940).

In 1991, the Supreme Court of South Carolina held that:

> [t]he general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the court will consider and construe them together.

Cafe Associates, LTD., v. Gerngross, 305 S.C. 6, 406 S.E.2d 162, 164 (1991), *quoting Klutts Resort Realty, Inc. v. Down'round Development Corp.,* 268 S.C. 80, 232 S.E.2d 20, 24 (1977).

Additionally, South Carolina law provides for cases involving a three party transaction: buyer, seller, and real estate agent. In *Bishop Realty v. Perk, Inc.,* 293 S.C. 538, 362 S.E.2d 26 (1987), the court held that a *subsequent agreement* by the purchaser and seller did not eliminate the previously agreed upon commission of the third party real estate agent *without his consent. Bishop Realty v. Perk, Inc., supra,* 292 S.C. at 185, 355 S.E.2d at 300-301. Significantly, the court ruled that the agreement which did not contain the agreed upon sales commission was not to govern the terms of the commission agreement since that agreement failed to contain the mutual manifestation of assent as to all essential terms necessary for the contract. Similar to *Bishop,* the Prudential Commitment is the document evidencing Prudential's agreement to give notice and a right

to cure. Further, it was accepted by Youmans and relied upon him in selling the Hotel on the terms and conditions set forth in the Purchase Agreement, as well as later reiterated in the two escrow agreements signed at closing requiring that the terms and conditions of the Commitment be complied with (App. 53; 60). Further, South Carolina has cited with approval *American Realty v. Chase Manhattan Bank, supra,* wherein the court held that when an interpretation of a deed of trust would wipe out an independent agreement personally granting an obligation, thus making the execution of the agreement a fruitless act, that such an interpretation would be erroneous and contrary to the intention of the parties. *Id.* 281 S.E.2d at 831. Therefore, as noted by the South Carolina court:

> When an interpretation of a contract makes signing it a meaningless act, an alternative interpretation giving its terms practical effect will be accepted.

Hope Petty Motors of Columbia, Inc. v. Hyatt, Slip Op. No. 1932 (S.C. Ct. App. filed Dec. 22, 1992).

South Carolina also provides that in construing the instruments to determine the agreement of the parties, South Carolina's Parol Evidence Rule specifically allows the admission of parol evidence in a controversy between a third party (Youmans) and one of the parties to an instrument (Prudential). *City of Orangeburg v Buford,* 227 S.C. 280, 87 S.E.2d 822 (1955). The purpose of this rule is to allow [Youmans] the right to show that *the [mortgage],* which he did not sign, *did not express the full* or true character of the *transaction. Ex Parte Moore,* 161 S.C. 107, 159 S.E. 503 (1931). Parol evidence is admissible to show a separate and independent agreement. *Beckham v. Short,*

294 S.C. 415, 365 S.E.2d 42, 43 (Ct. App. 1988). When the question is: whether the parties assented to a writing as an integration of the contract, the question is one of fact for the jury, to be determined from *the whole of the evidence. Carolina Mechanical Contractors, Inc. v. Yeargin Construction Co., Inc.*, 261 S.C. 1, 193 S.E.2d 224, 228 (1973). Ambiguities or conflicts must be construed against the party preparing the document. *Mid-Continent Refrigerator Co. v. Way*, 263 S.C. 101, 208 S.E.2d 31 (1974).

In Youmans' case, the jury was charged with this law (App. 74-80) and determined from the evidence presented, construing the instruments together to determine the entire agreement between the parties (App. 76), that the Youmans' Commitment letter (which embodies Youmans rights and contains an integration clause), survived the closing and remains part of Prudential's contractual obligations during the life of Prudential's mortgage with the borrower; and that these rights were never surrendered by Youmans.

II. The Fourth Circuit Exceeded Its Authority by Reweighing the Evidence and Substituting Its Judgment for the Fully Supported Facts Determined By The Jury In Violation of the Seventh Amendment Right to a Jury Trial

The Doctrine of Merger is inapplicable to a consistent agreement that was not intended to be merged into another written agreement. *Lingefelt v. Forest Hills Homes, Inc.*, 305 S.C. 197, 406 S.E.2d 394, 396 (Ct. App. 1991), *quoting Rentco, a Div. of Fruehauf Corp. v. Tamway Corp.*, 283 S.C. 265, 321 S.E.2d 199 (Ct. App. 1984). The question

of intent is one of fact for the jury. *Cafe Associates, LTD., v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162, 164 (1991), *citing Black v. Freeman*, 274 S.C. 272, 262 S.E.2d 879 (1980); *See also Stoval Building Supplies, Inc. v. Mottet*, 305 S.C. 28, 406 S.E.2d 176, 180 (Ct. App. 1990) ("The question of waiver is a matter for the jury."). In determining the intent of the parties, South Carolina's Parol Evidence Rule specifically allows the admission of parol evidence in a controversy between a third party (Youmans) and one of the parties to an instrument (Prudential). *City of Orangeburg v Buford*, 227 S.C. 280, 87 S.E.2d 822 (1955). The purpose of the parol evidence rule is to allow [Youmans] the right to show that the [mortgage], which he did not sign, did not express the full or true character of the transaction. *Ex Parte Moore*, 161 S.C. 107, 159 S.E. 503 (1931). Ambiguities or conflicts must be construed against the party preparing the document. *Mid-Continent Refrigerator Co. v. Way*, 263 S.C. 101, 208 S.E.2d 31 (1974).

In Youmans' case, the jury found the Commitment letter to be a consistent agreement to the mortgage and that the parties did not intend to surrender Youmans' rights which were negotiated for and included in the Commitment, and as such, these rights were not merged into the mortgage. In reversing the jury decision, it was necessary for the Fourth Circuit to re-weigh the evidence and substitute its findings of fact for the jury's to determine that ¶30 or ¶9(e) were not consistent and that the parties did not intend to retain Youmans' rights (App. 12-15).

In re-weighing the evidence, the Panel determined that ¶30 of the mortgage and ¶9(e) conflict and cannot be read together (App. 13-14). The Panel's reliance on the

alleged ¶30 conflict is misplaced. Paragraph 30 of the mortgage is reconcilable with ¶9(e) of the Commitment and Youmans' second and third mortgage notes as found by the jury, demonstrated by the fact that at the time the parties entered into the Commitment they contemplated the use of Prudential's form note and mortgage. Therefore, Prudential did not see its mortgage as incompatible with Youmans' rights since they are both included in its Commitment. Additionally, Prudential's mortgage (which Prudential drafted) refers to Youmans' second and third contemporaneous mortgages as approved and existing "subordinate liens." Prudential's mortgage ¶30 claims to be superior only to the rights of the holder of any "intervening lien or encumbrance." Prudential failed to define "intervening lien or encumbrance." *Black's* defines intervening as "one which could not have been reasonably expected." Certainly, Prudential reasonably expected Youmans' rights to be, at least compatible to those claimed by Prudential in ¶30. After all, Prudential witnesses reiterated that their only interest was to be paid. The lack of definition by the Prudential must be strictly construed in Youmans' favor. Even assuming that ¶30 and ¶9(e) conflict, Youmans' second and third mortgages gave him the right to perform the Purcaser's obligations under the Prudential's mortgage, and add those payments (including regular or accelerated payments) to his secured obligation. This in and of itself enabled Youmans to foreclose or to participate in any "workout" of the defaulted first mortgage. Prudential was keenly aware of these rights since it approved Youmans mortgages.

South Carolina provides that when the question is: whether the parties assented to a writing as an integration of the contract, *the question is one of fact for the jury, to be determined from the whole of the evidence. Carolina Mechanical Contractors, Inc. v. Yeargin Construction Co., Inc.*, 261 S.C. 1, 198 S.E.2d 224, 228 (1973). It is simply not the function of [the Fourth Circuit] to weigh the evidence concerning factual issues, but only to demonstrate whether contested facts are present for jury determination. *Hardware Mutual Casualty Co. v. Jones*, 363 F.2d 627 (4th Cir. 1966). Where a contract is ambiguous or capable of more than one construction, the question of what the parties intended becomes one of fact, and the question should be submitted to the jury. *Cafe Associates, LTD., v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162, 164 (1991), *citing Black v. Freeman*, 274 S.C. 272, 262 S.E.2d 879 (1980) and *Wheeler v. Globe and Rutgers Fire Insurance Co.*, 125 S.C. 320, 118 S.E. 609 (1923). In a recent pronouncement by the South Carolina Court of Appeals, (the same court that had earlier decided *Wilson*), a document disclaiming a personal guaranty was allowed to be reconciled with another document entered into as part of the same transaction which purported to bind the individual personally. The South Carolina Court of Appeals *upheld the jury finding* of personal liability *stating that the intent* of the parties was the *controlling factor. Hope Petty Motors of Columbia, Inc. v. Hyatt*, Slip Op. No. 1932 (S.C. Ct. App. filed Dec. 22, 1992).

In weighing the evidence to determine the intent of the parties, the Panel clearly exceeded its role in reviewing the facts of this case. JNOV after the verdict may be granted only when, *without weighing the credibility of the*

evidence, there can be but one reasonable conclusion as to the proper judgment. *United States v. Tobias*, 899 F.2d 1375 (4th Cir. 1990). Where there is sufficient conflicting evidence [as here] or insufficient evidence to conclusively establish [Prudential's] case, JNOV after the verdict should not be awarded. *Id.* There is no reason to doubt that the ultimate findings represented the Panel's own considered conclusions which was to subject those findings of fact made by the jury to a more stringent appellate review than is called for by the applicable rules.

The Fourth Circuit Committed Plain Error. The Fourth Circuit Panel committed plain error in basing its reversal of the judgment below on a wholly erroneous interpretation of South Carolina merger law, as well as on an erroneous factual finding. The Panel applied inapplicable and distinguishable South Carolina merger law and announced a "strong presumption" which is broader than the present merger law in South Carolina.[9] The Panel's newly created "strong presumption" was improperly used in its re-evaluation of the factual evidence. In doing so, the Panel committed

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[9] The Panel did not certify the facts to ascertain whether the Panel's "strong presumption" is a permissible interpretation and application of South Carolina merger case law to the facts of this case; or whether other South Carolina precedent requiring instruments entered into at different times (as in this case), but relating to the same subject matter (as in this case), be construed together to determine the parties' intent to ascertain and enforce the *entire agreement* among the parties (as the jury found). *See, Lehman Brothers v. Schein*, 416 U.S. 386, 394 (1974) ("State certification procedures are a *very desirable* means by which a federal court may ascertain an undecided point of state law . . . ." (emphasis added)). The denial of the Petitioner's motion to certify "the issues raised by this case" constitutes an abuse of discretion on behalf of the Panel (App. 5).

plain error in failing to note that Prudential's obligations are embodied in the contractual stipulations sections, in addition to the recital sections. The Panel erred in finding the references to the Commitment letter were in the recital sections only and "[g]enerally, [such recitals] do not have the force of contractual stipulations" and therefore, "do not help [Youmans] surmount the *Joyce* presumption" (App. 15). Correcting this plain factual error, in and of itself, forms a basis for upholding the jury decision on both the contract and negligence causes of action. After all, the Fourth Circuit acknowledged that Prudential could have been negligent in the performance of its Commitment Letter obligation under South Carolina law (App. 16-17).

CONCLUSION

This case demonstrates the United States Court of Appeals for the Fourth Circuit's departure from the accepted and usual course of judicial proceedings which calls for an exercise of this Court's power of supervision. Having determined that the operative laws of South Carolina govern the duties of the parties and construction of the instruments, the Fourth Circuit in its substitution of Massachusetts law for the operative laws of the Supreme Court of South Carolina, and in its failure to properly ascertain and apply the laws of the Supreme Court of South Carolina, clearly failed to apply state law within the requirement of 28 U.S.C.A. § 1652, and the Court's decision in *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938). Additionally, in weighing the evidence, and impermissibly substituting its findings of fact for the fully supported factual determinations of the jury, the Fourth Circuit

exceeded its authority and proper role. *See Lust v. Clark Equip. Co., Inc.*, 792 F.2d 436, 437-438 (4th Cir. 1986), *quoting Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 1055-56 (4th Cir. 1976). Moreover, the Panel based its reversal of the judgment below on a wholly erroneous interpretation of South Carolina law, as well as on a wholly erroneous factual finding. Due to the aforementioned reasons, the writ should be granted.

Respectfully submitted,

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February 2, 1993

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JULIAN R. YOUMANS, Individually and as Former Director and Liquidating Trustee of Francis Marion Hotel, Incorporated, a Dissolved South Carolina Corporation, and as Successor to Francis Marion Hotel, Incorporated, a Dissolved South Carolina Corporation; REED N. YOUMANS, as the Former Director and Liquidating Trustee of Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation; FRANCIS MARION HOTEL, INCORPORATED, a Dissolved South Carolina Corporation, *Plaintiffs-Appellees,* v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, *Defendant-Appellant,* and HOSPITALITY ASSOCIATES OF CHARLESTON; MARTIN HECHT; JEFFREY STOLER, *Defendants.*	No. 91-2552

JULIAN R. YOUMANS, Individually and as Former Director and Liquidating Trustee of Francis Marion Hotel, Incorporated, a Dissolved South Carolina Corporation, and as Successor to Francis Marion Hotel, Incorporated, a Dissolved South Carolina Corporation; REED N. YOUMANS, as the Former Director and Liquidating Trustee of Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation; FRANCIS MARION HOTEL, INCORPORATED, a Dissolved South Carolina Corporation,

Plaintiffs-Appellants,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Defendant-Appellee,

and

HOSPITALITY ASSOCIATES OF CHARLESTON; MARTIN HECHT; JEFFREY STOLER,

Defendants.

No. 91-2554

Appeals from the United States District Court
for the District of South Carolina, at Charleston.
Falcon B. Hawkins, Chief District Judge;
David C. Norton, District Judge.
(CA-88-1258-2-18)

Argued: June 1, 1992

Decided: September 28, 1992

Before ERVIN, Chief Judge, and HALL and MURNAGHAN, Circuit Judges.

Affirmed in part, reversed in part, and remanded by unpublished opinion. Chief Judge Ervin wrote the opinion, in which Judge Hall and Judge Murnaghan joined.

COUNSEL

ARGUED: Jay D. Bennett, ALSTON & BIRD, Atlanta, Georgia, for Appellant. Patrick Michael Duffy, MCNAIR LAW FIRM, P.A., Charleston, South Carolina, for Appellees. **ON BRIEF:** Richard R. Hays, ALSTON & BIRD, Atlanta, Georgia; Thomas S. Tisdale, Jr., Michael A. Molony, YOUNG, CLEMENT, RIVERS & TISDALE, Charleston, South Carolina, for Appellant. Michael A. Scardato, MCNAIR LAW FIRM, P.A., Charleston, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

ERVIN, Chief Judge:

Dr. Julian Youmans owned the Frances Marion Hotel (Hotel) in downtown Charleston, South Carolina in the corporate form of Francis Marion Hotel, Inc. (FMH, Inc.). Youmans sold the Hotel to Hospitality Associates of

Charleston, Inc. (HAC), Martin Hecht and Jeffrey Stoler, general partners, in 1979 for $10,050,000. Of this amount, $6,000,000 was in the form of a first mortgage by Prudential Insurance Corporation of America (Prudential), and $2,550,000 was in the form of second and third nonrecourse mortgages financed by Youmans. After about a year, HAC began having trouble making its mortgage payments to Prudential, and Prudential negotiated a "workout agreement" with HAC in which Prudential agreed to forebear payments for six months. HAC kept Youmans' mortgages current, however, so he would call a default. HAC then breached the workout agreement. Prudential at that point sent Youmans a letter informing him, for the first time, that HAC was in default. Prudential foreclosed on its mortgage, but the proceeds were insufficient to pay Youmans anything on his subordinate notes.

Youmans brought suit in the District of South Carolina under the court's diversity jurisdiction, maintaining that Prudential had agreed to inform him of any defaults by HAC when they first occurred, i.e., at the time of the workout agreement. The jury awarded Youmans $100,000 for breach of contract by Prudential, $1,000,000 for negligence by Prudential and $500,000 in punitive damages. The jury found against Youmans on his claims of fraud and breach of contract accompanied by fraud.[1] The district court directed a verdict in favor of Prudential on

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[1] The jury also returned an award of actual and punitive damages against HAC, Hecht and Stoler for breach of contract, breach of contract accompanied by a fraudulent act, and fraud, although these co-defendants claimed to be insolvent.

Youmans' conspiracy claim. Prudential appeals the contract and negligence awards on the ground that the court erred in refusing to grant judgment notwithstanding the verdict (JNOV) in its favor, and Youmans cross-appeals the directed verdict on the conspiracy claim. We hold that the court erred in refusing to enter JNOV on the contract and negligence awards, and thus reverse these judgments,[2] and we affirm the court's directed verdict on the conspiracy claim.

I.

In 1979, Youmans purchased the Hotel, which has 254 rooms and was constructed in 1924. He entered into a purchase agreement with HAC on September 19, 1984, agreeing to sell the Hotel for $10,050,000.[3] Of this amount, HAC agreed to pay FMH, Inc. $7,500,000 in cash – $6,000,000 in proceeds from a first mortgage issued by Prudential (for which HAC was required to make monthly mortgage payments of $72,000 to Prudential) and $1,500,000 from limited partner investors. HAC agreed to execute two non-recourse promissory notes in favor of FMH, Inc. for the balance of the purchase price. The purchase agreement incorporated by reference the

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[2] Subsequent to oral argument, Youmans has made a motion for this court to certify the issues raised by this case to the South Carolina Supreme Court for disposition in that forum. Because we find resolution of the issues clear under existing South Carolina case law, we reject this motion.

[3] The partnership at this time was called Hecht and Stoler, Inc.; for convenience, we will refer to the Hecht and Stoler partnership throughout as HAC, the actual Hotel purchaser.

commitment letter HAC subsequently obtained from Prudential.

On October 26, 1984, Prudential approved HAC's loan application and issued the commitment letter agreeing to make a $6,000,000 loan. Between Martin Hecht and Jeffrey Stoler and Prudential there were some social and business connections, including the fact that Hecht and Stoler managed a number of Prudential hotels. Youmans, through HAC, negotiated for a provision (hereinafter, "section 9(e)") that was included in the commitment letter:

> The Mortgaged Premises shall not be encumbered by any secondary or subordinate liens, except for a second mortgage loan in the original principal amount of $2,550,000, and a third mortgage loan in the original principal amount of $1,000,000, the second and third mortgage both having a term of seven years and with all interest accrued and not due during the first two years. . . . Prudential also agrees as follows:
>
> > (i) That, in the event of a monetary default under the Prudential first mortgage, Prudential will allow the second or third lienholder the right to bring the first mortgage current within 30 days of written demand therefor by Prudential; and
> > (ii) that, in the event the second or third lienholder forecloses or takes a deed in lieu of foreclosure, such event will not cause an exercise by Prudential of its rights under the due on sale clause contained in the Prudential first mortgage.

Section 9(e), J.A. 2019-20.

On December 12, 1984, HAC, FMH, Inc., and Prudential attended a day-long closing to transfer ownership of the Hotel. All three parties were represented by counsel and each had the opportunity to review all documents. HAC and Prudential closed the first mortgage, which included the following provision:

> 30. Actions by Mortgagee:
>
> a. Without affecting the liability of Mortgagor or any other person (except any person expressly released in writing) for payment of any indebtedness secured hereby or for performance of any obligation contained herein, and without affecting the rights of Mortgagee with respect to any security not expressly released in writing, Mortgagee may, at any time and from time to time, either before or after the maturity of said Note, and without notice or consent:
>
> i. Release any person liable for payment of all or any part of the indebtedness or for performance of any obligation.
>
> ii. Make any agreement extending the time or otherwise altering the terms of payment of all or any part of the indebtedness, or modifying or waiving any obligation, or subordinating, modifying or otherwise dealing with a lien or charge hereof.

J.A. 2091. The mortgage did not contain the section 9(e) language of the commitment letter, and it included a number of other modifications of the commitment letter as well.

Two escrow agreements were also executed at closing, one among Prudential, FMH, Inc., and HAC for $950,000 to be set aside to guarantee payment of the

Furniture, Fixtures & Equipment lease, the other among Prudential, HAC, and a bank as Ramada Inn's agent for $150,000 to be set aside to pay Ramada's franchise fee. Both agreements included, in the recitals, the statement:

> WHEREAS, Lender [Prudential], pursuant to its Loan Commitment dated October 26, 1984 (the "Commitment"), agreed to disburse the principal sum of Six Million Dollars ($6,000,000.00) ("the Loan") to Borrower [HAC] to finance Borrower's acquisition of the Hotel, upon the terms and conditions set forth therein. . . .

J.A. 2536, 2544.

HAC and FMH, Inc. also executed the second and third purchase money mortgages. FMH, Inc. acknowledged in these mortgages that they were inferior to Prudential's first mortgage. These mortgages included a cross-default clause, whereby HAC's default of another mortgage would constitute a default of its notes to FMH, Inc., and they required HAC to notify FMH, Inc. if such a default occurred. The mortgages also included a provision allowing FMH, Inc. to cure HAC's obligations on any mortgage should it choose to do so.

In November 1985, almost a year after closing, HAC notified Prudential that it would have problems meeting its obligations under the first mortgage. HAC and Prudential representatives met in January 1986 to devise a workout agreement. The parties later worked out the details: HAC would try to raise an additional $1.5 million in equity from investors; Prudential would forebear on mortgage payments for six months; HAC would agree not to contest foreclosure; and HAC would agree to defer

payment of management fees and repayment of loans to its general partners from Hotel proceeds.[4] HAC made six months' payments beginning in June 1986. HAC then missed four more payments, January through April 1987; it made the May 1987 payment; and then it missed the June 1987 payment. At that time, Prudential decided that HAC's violations of the workout agreement constituted "unacceptable default." J.A. 2238.

During the time of the workout agreement, HAC apparently made false statements to FMH, Inc. that it was solvent, and it paid interest on FMH, Inc.'s notes so that FMH, Inc. would not call a default on those notes. Prudential knew, but apparently disapproved, of the fact that HAC was paying Youmans' notes, since Prudential sent HAC a letter on April 20, 1987 demanding that HAC's payments to the secondary lienholder cease until Prudential's loan obligations had been made current.

Not until late September 1987 did a Prudential attorney inform Youmans of Prudential's attempt to foreclose on the Hotel, which was apparently the first Youmans had heard about HAC's problems with the first mortgage or the Hotel generally. Prudential's letter of October 5, 1987 to Youmans stated that the "reinstatement figure" as of October 1, 1987 was $1,300,000. J.A. 2248. Youmans' total cost to cure at that point would have been closer to $2,000,000, including penalties, attorneys' fees and participation fees. Prudential gave Youmans 24 days to come up with a proposal before it filed its foreclosure papers.

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[4] HAC was ultimately unsuccessful in raising additional funds, and, contrary to the agreement, HAC paid itself management fees and repaid the loans from its general partners.

Youmans decided that it was "commercially unreasonable" to pay the full arrearage, J.A. 519, and he did not cure the default or purchase the Hotel at the foreclosure sale. Prudential did purchase the Hotel at foreclosure, although for less money than it was owed by HAC. Youmans therefore received nothing on his subordinate mortgages. Prudential apparently discovered a major asbestos problem at the Hotel and ultimately closed it down.

II.

Our task in a diversity case such as this one is to apply the operative state law as would the highest court of the state in which the suit was brought. We therefore must interpret the agreements in this case as would the South Carolina Supreme Court. *See Liberty Mutual Ins. Co. v. Triangle Indus.*, 957 F.2d 1153, 1156 (4th Cir. 1992).

The question we must answer in deciding Prudential's motions for JNOV is whether there is evidence on which a jury could properly have based its verdicts for Youmans on each claim. *Lust v. Clark Equip. Co.*, 792 F.2d 436, 437 (4th Cir. 1986). If, resolving all factual disputes in favor of Youmans, we conclude that Prudential is nevertheless entitled to judgment as a matter of law, JNOV is required.

A.

Youmans' argument supporting the jury's breach of contract verdict is that section 9(e) of the October 26, 1984 commitment letter between Prudential and HAC was

included for Youmans' benefit. Youmans contends that section 9(e) required Prudential to notify Youmans in a timely fashion of any HAC default in the first mortgage and to allow Youmans the opportunity to cure the default. Youmans maintains that Prudential breached this contractual duty by not notifying Youmans until September 1987 of HAC's default, even though HAC had first defaulted in November 1985. Youmans argues that this delay was damaging to him because, by virtue of Prudential's delay in serving notice, the costs to cure HAC's default and take over ownership of the property became prohibitive, and as a result he lost all value in his notes.

As an initial matter, Youmans is correct that he is an intended third party beneficiary of the section 9(e) language in the commitment letter. *See Wise v. Picow*, 101 S.E.2d 651, 655 (S.C. 1958). Youmans negotiated for the provision, and the language was clearly included for his benefit. Youmans is entitled to sue on this asserted obligation. *See* 17A Am. Jur. 2d *Contracts* § 456 (1991) (third party beneficiary's act of suing on contract sufficient to constitute acceptance of and thus convey rights under contractual promise). Further, Youmans has at least an arguable claim that the section 9(e) language required timely notice. According to section 9(e)(i), "[I]n the event of a monetary default under the Prudential first mortgage, Prudential will allow the second or third lienholder the right to bring the first mortgage current within 30 days of written demand therefor by Prudential." J.A. 2020.

However, interpretation of the language of the commitment letter is not necessary to the resolution of this

case. Youmans concedes that the final documents executed at closing did not include the section 9(e) language and that Prudential did not agree in any other provision to provide Youmans with notice. Youmans must therefore argue that section 9(e) of the commitment letter survived closing and remained part of Prudential's contractual obligations during the life of its mortgage with HAC.

The South Carolina Court of Appeals considered and rejected a similar claim in *Wilson v. Landstrom*, 315 S.E.2d 130 (S.C. App. 1984). In *Wilson*, a seller maintained that a provision of the mortgage her agent signed on her behalf was directly contradictory to and therefore breached a previous contract between the seller and buyer. The court held, however, that "[t]he deed and mortgage delivered and accepted at closing, not the prior contract, represented the final bargain of the parties." *Id.* at 132. The Court based its ruling on the South Carolina Supreme Court's decision in *Charleston & Western Carolina Ry. Co. v. Joyce*, 99 S.E.2d 187 (S.C. 1957). The *Joyce* court first noted that " '[t]he doctrine of merger is founded upon the privilege, which parties always possess, of changing their contract obligations by further agreements prior to performance.' " *Id.* at 193 (quoting *Snyder v. Roberts*, 278 P.2d 348, 352 (Wash. 1955)); *see also Jones v. Cooper*, 109 S.E.2d 5, 10 (S.C. 1959) ("written agreement between two persons merges all prior talk and negotiations about the subject of the agreement"). The *Joyce* court then applied the general merger rule to deeds:

> "Where there is no mistake or fraud a deed executed subsequently to the making of an executory contract for the sale of land is generally regarded as conclusive evidence of a previous

> modification of the executory contract. A deed executed subsequent to the making of an executory contract for the sale of land supersedes that contract. . . . "

Id. (quoting 55 Am. Jur. *Vendor and Purchaser* § 327). The *Wilson* court extended to mortgages the merger rule as expressed in *Joyce*, 315 S.E.2d at 133, and concluded that, by having accepted the final mortgage at closing, the seller could not rely on the terms of a contradictory prior executory contract concerning the mortgage *Id.* at 132.

The court in *Joyce* did recognize an exception to the merger rule: When the parties did not intend to surrender rights negotiated for in the previous contract, the previous contract remans binding. 99 S.E.2d at 193. The *Joyce* court stated immediately before noting this exception that the fact that the deed is executed subsequent to the prior contract "is generally regarded as conclusive evidence" of a modification of the contract. We take this statement to constitute a strong presumption that the parties do not intend that rights provided in an earlier contract should survive a later manifestation of the contract that does not include those rights.

In this case, Youmans has not pleaded mistake or fraud in HAC's and Prudential's decision to leave the commitment letter's section 9(e) language out of the final mortgage; he argues instead that the parties intended for the terms of the commitment letter to remain binding in conjunction with the terms of the mortgage. Youmans cannot meet his burden on this issue. Two provisions that directly conflict cannot be read together; only one can remain binding. In this case, the first mortgage executed at closing and the commitment letter directly conflict on

whether the right Youmans asserts was negotiated for in section 9(e), that Prudential owes Youmans notice of HAC's default, is due. Section 30 of the mortgage clearly gave Prudential the right "without notice or consent" to enter into an agreement waiving or extending HAC's terms under the mortgage, and it is Youmans' reading of section 9(e) that any such "workout agreement" constitutes a default for which notice is required. Surely the mortgage would not have conflicted with the commitment letter on this point if the parties, financially sophisticated and represented by able counsel, had intended the commitment letter's notice requirements to continue. The case thus fits squarely within *Wilson*, where the provisions at issue conflicted and the court naturally held that the mortgage's provision, as the later expression of the parties' agreement, controlled over the provision of the earlier contract.

In support of his intent argument, Youmans points to references in the two escrow agreements to the terms and conditions of the commitment letter. However, these passing references in the escrow agreements, rather than in the mortgage itself, are too slender a reed upon which to rebut the presumption against finding that the parties intended to include the specific section 9(e) language in the closing documents.

We note that Youmans is selective as to exactly what provisions of the commitment letter survived closing, since the mortgage also changed other elements of the commitment letter, some of which benefitted Youmans. For example, section 9(e) of the commitment letter also stated that all interest under the second and third notes would accrue and not be due during the first two years,

while the second note signed at closing required that interest be due to the extent that the Hotel generated profits and the third note began to accrue interest immediately. The escrow agreements' passing references to the commitment letter would be of no help in determining which specific elements of the letter remain operative. Because Youmans gives us no reason to favor the notice language over other commitment letter language, the escrow agreements do not help him surmount the *Joyce* presumption. In addition, the references to the commitment letter were in the recitals section of the escrow agreements, and "[g]enerally, [such recitals] do not have the force of contractual stipulations." 17A Am. Jur. 2d *Contracts* § 392 (1991).

Therefore, we hold that the closing documents did not evidence an intention by the parties to retain the section 9(e) notice language. As a result, we hold that the final first mortgage between HAC and Prudential supersedes the commitment letter and controls Prudential's obligations. Because judgment must be entered in Prudential's favor on the contract claim as a matter of law, we hold that the district court erred in denying Prudential's motion for JNOV.

B.

In South Carolina, a cause of action for negligence requires (1) the existence of a duty on the part of the defendant to protect the plaintiff; (2) the failure of the defendant to discharge the duty; and (3) injury to the plaintiff resulting from the failure to perform. *South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 346

S.E.2d 324, 325 (S.C. 1986). The question of whether a duty exists is one of law for the court. *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 238 S.E.2d 167, 168 (S.C. 1977).

It is difficult to pin down exactly what duty Youmans asserts that Prudential owed to him. It is clear that there is no general common law duty for superior mortgagees to refrain from extending time of payment for their mortgagors for the benefit of subordinate mortgagees. *See, e.g., Avondale Shipyards, Inc. v. Tank Barge, ETS 2303*, 754 F.2d 1300, 1308 (5th Cir. 1985) ("when one acquires a lien on property already encumbered by a mortgage, he does so subject to the possibility . . . that the lien of the mortgage may be extended beyond the original maturity date or that the terms of the indebtedness may otherwise change") (citing *Guleserian v. Fields*, 218 N.E.2d 397, 401-02 (Mass. 1966), which cites cases for this "universal rule"). Similarly, there is no generalized duty that superior lienholders owe to subordinate lienholders to notify them about defaults in the superior liens or to oversee workout agreements for their benefit, and Youmans presents us with no apposite authority to the contrary.

Youmans' strongest, and only remaining, argument is that Prudential owed him a duty arising out of contract, i.e., the commitment letter, to notify him in a timely fashion of HAC's default. Under this theory, Prudential was negligent in its performance of its commitment letter obligation, which also by implication included reasonable oversight of the workout agreement, and the duty was owed to Youmans as third party beneficiary. *See Workman v. National Supaflu Sys., Inc.*, 676 F.Supp. 690, 693 (D.S.C. 1987) ("The law is clear that if a person enters upon the performance of a contract, negligent performance, i.e.

performing the duties in an improper manner, can result in negligence liability."); *Barker v. Sauls*, 345 S.E.2d 244, 244 (S.C. 1986) ("A tort-feasor may be subjected to tort liability for injury to a third party arising out of the tort-feasor's contractual relationship with another, despite the absence of privity between the tort-feasor and the third party."). *But see Meddin v. Southern Ry-Carolina Div.*, 62 S.E.2d 109, 112 (S.C. 1950) ("if the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie"). This argument fails, however, because, as we have held, Prudential did not breach a contractual agreement of which Youmans was a beneficiary.

Because Youmans has not identified a duty owed to him by Prudential that Prudential arguably breached, we must hold that the district court erred in refusing to enter JNOV in favor of Prudential on Youmans' negligence claim. Accordingly, we must also reverse the punitive damages awarded pursuant to the jury's finding of negligence.

III.

Youmans cross-appeals the district court's decision, made at the close of evidence, to direct a verdict in favor of Prudential on Youmans' conspiracy claim. Our standard of review for JNOV is identical to our standard for a directed verdict.

In South Carolina, a civil conspiracy consists of (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) which causes the plaintiff special damages. *Yaeger v. Murphy*, 354 S.E.2d 393, 394

(S.C. App. 1987). "[E]vidence, direct or circumstantial, must be produced from which a [jury] may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Island Car Wash, Inc. v. Norris*, 358 S.E.2d 150, 153 (S.C. App. 1987) (describing elements of civil conspiracy).

Youmans contends that there was sufficient evidence in the record that HAC and Prudential conspired against him to create a jury question on the issue. We disagree. None of the evidence that Youmans presents rises above the level of an arguable conscious indifference by Prudential to Youmans. Youmans cannot demonstrate, as required, that Prudential had the purpose of injuring him. We find the fact that there were certain business and social contacts between officers at Prudential and HAC's general partners unremarkable, and not sufficiently probative of a conspiracy in the absence of specific evidence demonstrating a purpose to injure. Furthermore, that Prudential may have misrepresented its workout agreement to certain auditors does not tend to show a purpose to injure Youmans where there is no showing that Youmans ever relied on the misrepresentations, knew about them, or that they were related to him in any way. In addition, the fact that Prudential wrote HAC to order it not to continue paying the subordinate mortgages, which HAC was paying to conceal its default from Youmans, also supports the view that there was no conspiracy between Prudential and HAC to injure Youmans.

Therefore, we affirm the district court's directed verdict in favor of Prudential on Youmans' conspiracy charge.

IV.

For the aforementioned reasons, we hold that the district court erred in denying Prudential's motions for JNOV on Youmans' breach of contract and negligence claims, and we affirm the court's decision to enter a directed verdict in favor of Prudential on Youmans' conspiracy claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JULIAN R. YOUMANS, Individually and as Former Director and Liquidating Trustee of Francis Marion Hotel, a Dissolved South Carolina Corporation, and as Successor to Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation; REED N. YOUMANS, as Former Director and Liquidating Trustee of Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation; FRANCIS MARION HOTEL, INC., a Dissolved South Carolina Corporation,

Plaintiffs,

-vs-

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; HOSPITALITY ASSOCIATES OF CHARLESTON; MARTIN HECHT; and JEFFREY STOLER,

Defendants.

JUDGMENT

(Filed March 11, 1991)

Civil Action No. 2:88-1258-

This action came on for trial before the Court, Honorable David C. Norton, United States District Judge, presiding, and the issues having been duly tried and a decision having been rendered,

It is Ordered and Adjudged that the plaintiffs Julian R. Youmans, Individually and a Former Director and

Liquidating Trustee of Francis Marion Hotel, a Dissolved South Carolina Corporation, and as Successor to Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation; Reed N. Youmans, as the Former Director and Liquidating Trustee of Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation; Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation, recover of the defendant Prudential Insurance Company of America, on the breach of contract claim, the sum of One Hundred Thousand and no/100 ($100,000.00) Dollars; on the negligence claim, plaintiffs recover of the defendant Prudential Insurance Company of America, the sum of One Million Five Hundred Thousand and no/100 ($1,500,000.00) Dollars; as to the fraud claim and breach of contract accompanied by fraudulent act claim, judgment is in favor of defendant Prudential Insurance Company of America.

It is Ordered and Adjudged that the plaintiffs Julian R. Youmans, Individually and as Former Director and Liquidating Trustee of Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation and as Successor to Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation; Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation recover of the defendant Hospitality Associates of Charleston, Inc., on the breach of contract claim, the sum of Two Hundred Fifty Thousand and no/100 ($250,000.00) Dollars; as to the fraud claim, plaintiffs recover of the defendant Hospitality Associates of Charleston, Inc., the sum of Five Hundred Thousand and no/100 ($500,000.00) Dollars; as to the breach of contract accompanied by fraudulent act claim, plaintiffs recover of the defendant Hospitality Associates

of Charleston, Inc., the sum of Two Hundred Fifty Thousand and no/100 ($250,000.00) Dollars.

It is Ordered and Adjudged that the plaintiffs Julian R. Youmans, Individually and as Former Director and Liquidating Trustee of Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation, and as Successor to Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation; Reed N. Youmans, as the Former Director and Liquidating Trustee of Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation; Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation, recover of the defendant Martin Hecht, on the breach of contract claim, the sum of Two Hundred Fifty Thousand and no/100 ($250,000.00) Dollars; on the fraud claim, plaintiffs recover of the defendant Martin Hecht the sum of Five Hundred Thousand and no/100 ($500,000.00) Dollars; as to the breach of contract accompanied by fraudulent act, plaintiffs recover of defendant Martin Hecht the sum of Two Hundred Fifty Thousand and no/100 ($250,000.00) Dollars.

It is Ordered and Adjudged that the plaintiffs Julian R. Youmans, Individually and as Former Director and Liquidating Trustee of Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation, and as Successor to Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation; Reed N. Youmans, as the Former director and Liquidating Trustee of Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation; Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation, recover of the defendant Jeffrey Stoler, in the breach of contract claim, the sum of Two Hundred Fifty and no/100 ($250,000.00) Dollars; as to fraud claim, plaintiffs recover

of the defendant Jeffrey Stoler the sum of Five Hundred Thousand and no/100 ($500,000.00) Dollars; as to breach of contract accompanied by fraudulent act claim, the plaintiffs recover of defendant Jeffrey Stoler, the sum of Two Hundred Fifty Thousand and no/100 ($250,000.00) Dollars.

It is Further Ordered that plaintiffs recover of the defendants interest at the rate of 6.46 per cent and their costs of action.

Dated this 11th day of March, 1991, in Charleston, South Carolina.

ANN A. BIRCH, Clerk

By: /s/ Judith M. McDowell
Deputy

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
November 4, 1992

No. 91-2552

JULIAN R. YOUMANS, Individually and as Former Director and Liquidating Trustee of Francis Marion Hotel, Incorporated, a Dissolved South Carolina Corporation, and as Successor to Francis Marion Hotel, Incorporated, a Dissolved South Carolina corporation; REED N. YOUMANS, as the Former Director and Liquidating Trustee of Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation; FRANCIS MARION HOTEL, INCORPORATED, a Dissolved South Carolina Corporation

Plaintiffs-Appellees

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

Defendant-Appellant

and

HOSPITALITY ASSOCIATES OF CHARLESTON; MARTIN HECHT; JEFFREY STOLER

Defendants

No. 91-2554

JULIAN R. YOUMANS, Individually and as Former Director and Liquidating Trustee of Francis Marion Hotel, Incorporated, a Dissolved South Carolina Corporation, and as Successor to Francis Marion Hotel, Incorporated, a Dissolved South Carolina corporation; REED N. YOUMANS, as the Former Director and Liquidating Trustee of Francis Marion Hotel, Inc., a Dissolved South Carolina Corporation; FRANCIS MARION HOTEL, INCORPORATED, a Dissolved South Carolina Corporation

Plaintiffs-Appellants

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

Defendant-Appellee

and

HOSPITALITY ASSOCIATES OF CHARLESTON; MARTIN HECHT; JEFFREY STOLER

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellees' filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Ervin, with the concurrence of Judge Hall and Judge Murnaghan.

For the Court,

/s/ Bert M. Montague

CLERK

The Prudential Insurance Company of America
Atlanta Real Estate Investment Office
Suite 900 2200 Century Parkway N.E.
Atlanta, GA 30345
Telephone: 404-321-5313

October 26, 1984

Hospitality Associates of Charleston
c/o Jeffrey Stoler, Executive Vice President
First Hospitality Services, Inc.
9 East 41st Street
Suite 202
New York, New York 10017

Re: Loan Commitment #5 168 305
Francis Marion Ramada Hotel
Charleston, South Carolina

Gentlemen:

Pursuant to your Application we are pleased to issue this Commitment, wherein Hospitality Associates of Charleston, a New York Limited Partnership, is hereinafter referred to as Applicant, Mortgagor or Borrower, and this Company is referred to as Prudential or Mortgagee.

This Commitment is subject to the terms and conditions set forth on the Application Rider attached hereto and made a part hereof consisting of 26 numbered conditions on 16 pages, and Exhibits A, B and C setting forth the prepayment privilege, real property description, and personal property which is subject to leases, respectively.

Please note that this Commitment contains changes and additional conditions from the original Application Conditions, which changes are in Conditions 2(b), 3, 6(c), 21(a), 21(b), 21(e) 22, 23, and Exhibit A, and which additional conditions are Conditions 6(i) and 21(f).

This Commitment is further subject to the following terms and conditions:

1. This Commitment constitutes the entire agreement between Applicant and Prudential and sets forth all terms and conditions under which a loan by Prudential shall be made.

2. This Commitment is contingent upon your returning to Prudential: (i) the initialed Appliciation [sic] Rider, (ii) the signed original of the attached letter of acceptance, and (iii) an irrevocable and unconditional Letter of Credit in the amount of $120,000 to cover the Commitment Standby Fee, not later than November 8, 1984.

By issuance of this Commitment, the Fee referred to in Paragraph 16 is hereby deemed fully earned.

Please have your attorney contact Prudential's closing attorney, regarding this Commitment. When all title and loan requirements have been satisfactorily complied with, disbursement may then be scheduled in accordance with this Commitment.

To aid you in satisfying the survey and hazard insurance requirements of this Commitment, Prudential will forward to you two sheets entitled SURVEY INSTRUCTIONS and HAZARD INSURANCE INSTRUCTIONS, respectively. Also, an acceptable form of Letter of Credit is enclosed with this letter.

The attached letter of acceptance should be signed and returned to me on or before November 8, 1984, otherwise

Prudential, at its option, has the right to cancel this Commitment.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA

JW By: /s/ William J. Chesnut
William J. Chesnut
V.P., Real Estate Finance

Prudential	Application Rider
Real Estate Investment Office ATLANTA	Case No. 5 168 305

1. Loan Terms

Amount: $6,000,000

Interest Rate: 14.0%

Annual Loan Constant: 14.45% based upon a 300-month amortization schedule.

Interest only 0 months.

Term: 84 months.

Contingent interest equal to 2% of gross annual revenues.

Prepayment Privilege: There shall be no privilege to prepay the loan except as provided on the attached Exhibit A.

2. Security

The Loan shall be evidenced by a promissory note secured by:

(a) Mortgage

A valid first lien upon the fee simple estate in the Land and Improvements described on the attached Exhibit B which are hereinafter referred to as the Mortgaged Premises.

Date 10/22/84 Approved by applicant /s/ JS Approved by Prudential /s/ NF

Each of the pages of this Application Rider were so approved as noted above.

(b) Security Interest – Personal Property

A perfected security interest which shall constitute a first lien upon all furniture, furnishings, fixtures, and equipment now or hereafter installed in, affixed to, placed upon, or used in connection with the Mortgaged Premises including (upon the termination of the leases) any such items of property which are the subject of leases as identified in Exhibit C, but excluding any such items of property which are owned by /*Tenants. All leases of, and any options(s) to purchase, such equipment shall be subject to the approval of and assigned to Prudential as further security for the loan. An acceptable inventory shall be submitted to Prudential prior to the Closing Date. Such inventory shall include a detailed description, including make, model, and serial numbers where applicable, of all furniture, furnishings fixtures, and equipment necessary for the operation of a fully equipped 254-room hotel including bar, two restaurants, ballroom and meeting rooms.

As additional collateral for Prudential's Mortgage Loan, Applicant shall furnish to Prudential a Surety Bond from a company authorized to do business in South Carolina, the form and substance of which shall be subject to the approval of Prudential, which Bond and amount are to secure Prudential as to the payment of rent under the leases described in Exhibit C.

*Space

(c) Assignment of Leases

An assignment to Prudential, at its option, of all leases of all or any part of the Mortgaged Premises, together with all leases covering personal property.

(d) Conditional Assignment of Rentals

A conditional assignment to Prudential of all rents, issues and profits of the Mortgaged Premises, operative in the event of default.

3. Title

Title to the Mortgaged Premises and the property referred to in Condition 2(b) hereof shall be subject to the approval of Prudential and shall be good and marketable, and free and clear of all defects, liens, encumbrances, security interests, restrictions, and easements which are not acceptable to Prudential. Except the furniture, fixtures, and equipment listed in Exhibit C which are leased (prior to the termination of the leases), all property described in Condition 2(b) shall be owned by Applicant and shall not be the subject matter of any lease or other transaction whereby the ownership or any beneficial interest in any of said property shall be held by any person or entity other than Applicant. Applicant agrees to arrange the appropriate and reasonable documentation necessary to provide Prudential with a perfected first security interest to the personal property identified in Paragraph 2(b), including all items listed in Exhibit C (after the termination of the leases). All property described in 2(a) shall be located outside of the 100 year flood plain area.

4. Title Insurance

Applicant shall provide a ALTA policy of title insurance in form satisfactory to Prudential, issued by a company acceptable to Prudential, in an amount not less than the loan amount, insuring that Prudential's loan is a valid first lien on Applicant's unencumbered fee simple estate.

5. Ingress, Egress and Easements

(a) Ingress and egress to the Mortgaged Premises shall be by public road or by a deeded right-of-way easement included as part of the Mortgaged Premises and insured by the title insurance policy to be furnished Prudential.

(b) All easements, servitudes and other agreements, if any, regarding the mutual use and/or maintenance of the access roads, parking garage, recreation areas, party walls, or otherwise in any way affecting or appurtenant to the Mortgaged Premises shall be subject to the approval of Prudential, and all appurtenant easements or servitudes shall be insured by the title insurance policy to be furnished Prudential.

6. Requirements Prior to Closing

Prior to the Closing Date, the Applicant shall provide Prudential with the following:

(a) Survey

A survey of the Mortgaged Premises establishing that all Improvements are within the title lines. The survey shall be subject to the approval of Prudential, certified to Prudential by a registered Land Surveyor approved by Prudential, dated not more than one month prior to disbursement and in compliance with the minimum detail requirements for land title surveys as adopted by The American Land Title Association and American Congress on Surveying and Mapping. The survey shall include the total square footage of the land area.

(b) Owner's Affidavit

An Owner's Affidavit affirming, among other things: i) that all costs for labor and material for the construction of the Improvements have been paid in full, ii) that Applicant has paid for and is the owner of all furnishings, fixtures and equipment except those listed in Exhibit C, free of any security interests or liens, and iii) that no bankruptcy or insolvency proceedings have been instituted against Applicant.

(c) Legal Capacity

Evidence satisfactory to Prudential that Applicant has, and the persons signing the loan documents on its behalf have, the legal capacity and authority to enter into the loan transaction.

(d) Insurance

Prepaid fire and extended coverage insurance policies covering the Improvements and property referred to in Condition 2(b) for the full insurable value (including a replacement cost endorsement with waiver of depreciation, if available). The policies shall be written in amounts and with companies satisfactory to Prudential, shall contain non-contributory standard mortgagee clauses effective as of the Closing Date, shall be maintained throughout the term of the loan without cost to Prudential, shall be deposited with Prudential, and shall contain such provisions as Prudential deems necessary or desirable to protect its interest.

(e) Leases

Duplicate originals or Certified copies of all leases covering the Mortgaged Premises. These leases, excluding those listed in Exhibit C, shall be subject to approval by Prudential and shall be either prior to or subordinate to Prudential's loan, at Prudential's option. In addition, each Tenant shall execute an attornment agreement at Prudential's option.

(f) Tenant Estoppel Certificate

A written certification by each Tenant setting forth the commencement date of the lease term and confirming that: (i) the Tenant has accepted the premises, has made no advancements for or on behalf of the Landlord for which it has the right to deduct from or offset against future rentals as of

the date of certification and has not paid rent for more than the current month during which certification is made, (ii) the lease is in full force and effect, free from any default by either party, and has not been changed, modified or amended except as stated in the certification of the Tenant and (iii) all improvements have been completed by Landlord in accordance with plans and specifications approved by Tenant and Tenant is in full and complete possession thereof.

(g) Taxes and Assessments

Evidence satisfactory to Prudential that all installments of special taxes or assessments, service charges, water and sewer charges, private maintenance charges, and other prior lien charges by whatever name called, whether then due on the Closing Date or payable thereafter, and all installments of general real estate taxes due and payable, have been paid in full on or before the Closing Date.

(h) Compliance with Zoning, Building, Environmental and Other Laws

Evidence satisfactory to Prudential that the Mortgage Loan and the Mortgaged Premises and the proposed and actual use thereof comply with all laws, ordinances, rules and regulations of all governmental authorities having jurisdiction over the same and there is no action or proceeding pending before any court, quasi-judicial body or administrative agency at the time of any disbursement by Prudential relating to the validity of the Mortgage Loan or the

proposed or actual use of the Mortgaged Premises. All rights to appeal any decision rendered must have expired prior to closing.

i. Letter of Credit

At closing an irrevocable and unconditional Letter of Credit in favor of Prudential in the amount of $235,000 with an expiration date on or subsequent to a date twelve months following the date of the first disbursement. The Letter of Credit shall permit partial draws and may be drawn against by Prudential in the event of its failure to receive mortgage payments scheduled during the first twelve months of the loan period or if Applicant fails to pay the property management fee under the agreement described in Condition 22 hereof for the first year of operations. The form and substance of the Letter of Credit shall be subject to the approval of Prudential.

7. Form and Recording of Documents

The form and substance of all existing or proposed agreements, contracts, leases, plans, surveys, insurance policies and other documents which are necessary to satisfy any condition of the commitment shall be subject to the approval of Prudential. Prudential's form of Note and Mortgage shall be used in the loan. Prudential reserves the right to require recording or filing of any document or memorandum thereof used in connection with the loan.

8. Special Mortgage Provisions

The Mortgage shall contain, in addition to other provisions that may be required hereby, the following provisions binding on Mortgagor and all successive owners of the Mortgaged Premises:

(a) Maintenance of Improvements

Mortgagor shall constantly maintain and shall not diminish in any respect nor materially alter the Improvements (including landscaped and recreation areas) nor the on-site paved parking area during the existence of the Mortgage, and shall not erect any buildings or additions to existing buildings or other structures on the Mortgaged Premises without the prior written consent of Mortgagee.

(b) Annual Statements

Mortgagor to furnish Mortgagee with an Independent Certified Public Accountant audited annual operating statement in form satisfactory to Mortgagee, showing all elements of income and expenses for the operation of the Mortgaged Premises within 90 days of the close of each fiscal year of Mortgagor. The statement shall also include an annual rent schedule and a schedule of gross sales of each Tenant having a percentage lease. Mortgagee shall have the right, upon five days' prior written notice, to inspect and make copies of Mortgagor's books, records and income tax returns with reference to the Mortgaged Premises for the purpose of verifying any such report within three (3) years after it has been submitted.

(c) Tax and Insurance Deposits

In the event of dafault [sic], or in the event Mortgagor fails to make a tax or insurance payment, and at the election of the Mortgagee, the Mortgagor shall make monthly deposits on account of real estate taxes, assessments levied against the Mortgaged Premises and insurance premiums equal to one twelfth of the annual charges estimated by Mortgagee in order to accumulate with Mortgagee sufficient funds to pay such taxes, assessments and premiums 30 days prior to their due date.

9. Obligation to Disburse

Prudential's obligation to disburse the loan is contingent upon the following:

(a) Compliance

Each condition of the loan commitment has been satisfied in a manner acceptable to Prudential.

(b) Adverse Financial Change & Protection Against Bankruptcy

Applicant must furnish, immediately prior to closing, satisfactory up-to-date financial information as Prudential may require, including but not limited to certified financial statements of Applicant. If such information shall indicate that the net worth of Applicant at the time of such submission reflects a material adverse change as compared to the financial information represented to Prudential in the loan application and supporting documents, or if there is

filed by or against Applicant, prior to closing or after closing but prior to full disbursement of the loan proceeds, a petition in bankruptcy or a petition or answer seeking assignment for the benefit of creditors, the appointment of a receiver, trustee or liquidator with respect to the Applicant or any substantial portion of the Applicant's property, reorganization, arrangement, liquidation or dissolution or similar relief under the Federal Bankruptcy Laws or any state law, then Prudential shall have the option, without giving prior notice to Applicant, and without liability of any kind upon Prudential, to cancel the commitment and eliminate all of its obligations hereunder, including but not limited to the obligations to make any disbursements of loan proceeds. (For the purposes of this paragraph, Applicant shall also include any surety(ies) and any joint venturer or general partner of Applicant.)

(c) Damage or Destruction

If the Mortgaged Premises shall have suffered any material damage or destruction prior to any disbursement, the damaged or destroyed portion of the Mortgaged Premises must be restored or replaced in a manner acceptable to Prudential prior to the Closing Date.

(d) Closing Date

The disbursement of the loan, also referred to as the "Closing Date", shall be on or before December 20, 1984, time being of the essence, otherwise the loan commitment

may be cancelled at the option of Prudential without notice to Applicant.

(e) Additional Financing

The Mortgaged Premises shall not be encumbered by any secondary or subordinate liens, except for a second mortgage loan in the original principal amount of $2,550,000, and a third mortgage loan in the original principal amount of $1,000,000, the second and third mortgages both having a term of seven years and with all interest accrued and not due during the first two years. Applicant must receive the written permission of Prudential to place any additional secondary financing on the Mortgaged Premises for any purpose. Prudential also agrees as follows:

(i) that, in the event of a monetary default under the Prudential first mortgage, Prudential will allow the second or third lienholder the right to bring the first mortgage current within 30 days of written demand therefor by Prudential; and

(ii) that, in the event the second or third lienholder forecloses or takes a deed in lieu of foreclosure, such event will not cause an exercise by Prudential of its rights under the due on sale clause contained in the Prudential first mortgage.

10. Partnership Applicant

Applicant shall furnish to Prudential a fully executed copy of the limited partnership agreement of Applicant, the form and substance of which,

and the identity of the general and limited partners, shall be subject to the approval of Prudential.

11. Governing Law

The rights and obligations of the parties with respect to the application and any commitment issued by Prudential shall be determined in accordance with the laws of the state in which the real property securing the loan is located.

12. Mortgage/Deed of Trust

As used herein, Mortgage shall also mean Deed of Trust, Mortgagor shall also mean Trustor, Mortgage Loan shall also mean Loan secured by a Deed of Trust, and Mortgaged Premises shall also mean Premises encumbered by a Deed of Trust in favor of Prudential as Beneficiary.

13. Prohibition Against Assignment of Loan Commitment

Neither Prudential's loan commitment nor any rights thereunder are assignable.

14. Loan Commission

Prudential shall not be obligated to pay any loan commissions in connection with either this application or loan commitment, if issued.

15. Closing Costs

Applicant shall pay all closing costs, title company premiums and charges, survey costs,

recording fees and taxes, and all other expenses in connection with the preparation and closing of the loan.

16. Application Fee

Prudential hereby acknowledges receipt of an application fee in the amount of $60,000 which fee Applicant has paid to Prudential in consideration of the substantial services Prudential shall render in connection with the evaluation, preparation, and processing of the application. Applicant acknowledges that the application fee will be earned by Prudential if the application is authorized in the form and substance in which it was submitted. If, prior to authorization of the application by Prudential, Applicant withdraws this application, Prudential shall be deemed to have earned the entire sum paid hereunder in consideration for the substantial services which Prudential rendered in the evaluation, preparation, and processing of the application.

17. Commitment Standby Fee

Applicant will deposit with Prudential a commitment standby fee in the amount of $120,000 in the form of an irrevocable and unconditional Letter of Credit, the form and substance of which shall be subject to the approval of Prudential or in the form of a Certificate of Deposit in favor of Prudential with interest payable to Applicant, upon the issuance of Prudential's loan commitment. Applicant acknowledges that the commitment standby fee is in consideration of the issuance of a loan commitment by Prudential to Applicant which, under commercial

practice, is recognized to have value. Prudential will return the commitment standby fee to Applicant, without interest, upon the closing of the loan. Should the loan not be disbursed for reasons attributable to the borrower, Prudential shall have the right to retain the commitment standby fee as additional consideration for the issuance of a loan commitment.

18. Publicity of Financing

Applicant hereby agrees that Prudential may release publicity articles concerning the financing of this Mortgage Loan only after the closing thereof. The cost of such publicity articles shall be paid by Prudential.

19. Special Counsel

Prudential shall require representation by a South Carolina attorney of its choice in the preparation and/or review of the loan documents, in the loan closing, and in all legal matters arising prior to the full disbursement of the loan funds. Applicant shall pay the reasonable and customary fee of said attorney.

20. Limitation of Liability of Partners (Limited Partnership)

The liability of General Partners of the Limited Partnership shall be limited, subject to the following conditions:

On the Closing Date, Prudential shall provide the individual General Partners with a letter under the terms of which Prudential will agree

that, in the event of any default under any of the instruments evidencing or securing the Mortgage Loan, Prudential will not seek or obtain any deficiency judgment against the General Partners of the Limited Partnership and shall satisfy itself solely out of the Mortgaged Premises and the assets of the Limited Partnership; provided, however, nothing contained herein or in any such letter shall limit Prudential's rights or remedies against the Limited Partnership under any of the instruments evidencing or securing the Mortgage Loan indebtedness either at law or in equity, except as above provided; and further provided, however, that this agreement not to pursue the personal liability of the individual General Partners *SHALL BECOME NULL AND VOID* and of no further force and effect in the event:

(a) all or any part of, or any interest in, the property securing the Mortgage Loan shall be further encumbered by a lien securing an obligation upon which the General Partners or any one or more of them shall be personally liable for repayment; or

(b) all or any part of, or any interest in, the property securing the Mortgage Loan is sold or conveyed without prior written consent of Prudential; or

(c) Applicant Limited Partnership should file, or there should be filed against such party (and the same is not dismissed within 30 days) a petition in bankruptcy or insolvency or a petition or answer seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the bankruptcy laws of

the United States or under any other applicable Federal, State or other statute or law, or a receiver, trustee or liquidator should be appointed with respect to such party.

21. Other Special Mortgage Provisions

The Mortgage shall contain, in addition to those provisions required in Condition 8 and other provisions that may be required hereby, the following provisions binding on Mortgagor and all successive owners of the Mortgaged Premises:

(a) Due on Sale or Encumbrance

(i) In the event the Mortgagor, without the prior written consent of Mortgagee, shall sell, convey, alienate, mortgage or encumber the Mortgaged Premises or any part thereof, or any interest therein or shall be divested of his title or any interest therein in any manner or way, whether voluntary or involuntary, (or in the event of any merger, consolidation or dissolution affecting the Mortgagor or a transfer of a majority interest in the Mortgagor or a transfer of a majority interest in any general partner of any Mortgagor which is a joint venture or general or limited partnership) the entire balance of the indebtedness shall become immediately due and payable at the option of Mortgagee. This provision shall not apply to transfers of title or interest under any will or testament or applicable law of descent.

(ii) It is understood that Mortgagor, after closing, will grant a conservation easement to The Preservation Society of Charleston

for the primary purpose of preserving the architectural character of the exterior surface of the Improvements and the interior of the Ballroom. Prudential must consent to the form and content of such easement, which consent will not be unreasonably withheld, provided it is substantially similar to that certain form of Conservation Easement furnished to Prudential under cover of Attorney Frederick E. Camerzell III letter dated August 6, 1984. Such easement shall not contain a provision giving The Preservation Society of Charleston a right or option to purchase the Improvements.

(b) Ownership of Personal Property

All property described in Condition 2(b) hereof, including (upon the termination of the leases) the property listed in Exhibit C which is subject to the leases listed in Exhibit C, shall be owned by Mortgagor and shall not be the subject matter of any lease or other transaction whereby the ownership or any beneficial interest in any of said property shall be held by any person or entity other than Mortgagor, nor shall Mortgagor create or cause to be created any security interest covering any of the property described in Condition 2 (b) as it may from time to time be replaced, other than the security interest created in favor of Prudential. Upon the termination of the leases listed in Exhibit C, Mortgagor agrees to take such actions as may be necessary to provide Prudential with a valid first lien against the property which is the subject of

such leases, including the amendment of the Mortgage Loan documents.

(c) Premises to be Sold as One Unit

Mortgagor hereby waives its rights, if any, to require that the Mortgaged Premises be sold as separate tracts or units in the event of foreclosure.

(d) Affirmation of Right of Acceleration

Mortgagor affirms on behalf of itself, its successors and assigns, that Mortgagee has the right to accelerate the maturity of the indebedness [sic] evidenced by the Note, in security of which this Mortgage is given, as provided by the terms and provisions of said Note.

(e) No Cooperative or Condominium

Mortgagor shall not operate the Mortgaged Premises, or permit same to be operated as a cooperative or condominium building or buildings in which the tenants or occupants participate in the ownership, control, or management of the Mortgaged Premises or any part thereof, as tenant stockholders or otherwise.

(f) Cross-Default

A default under the leases listed in Exhibit C shall also constitute a default under Prudential's Mortgage Loan.

22. Hotel/Motel Management Agreement

The form and substance of the management agreement between Applicant and First Hospitality Services, Inc. covering the Mortgaged

Premises shall be subject to the approval of Prudential, and shall be in full force and effect and free from default by either party on the Closing Date. First Hospitality Services, Inc., must accept possession of the Mortgaged Premises and take actual possession thereof on or before the Closing Date. The management agreement shall be subordinate to Prudential's Mortgage. The management agreement shall provide that payment of the management fee shall be subordinate to payment of debt service on the first mortgage.

23. Agreements, Documents and Leases

Franchise or License Letter Agreement

Prior to disbursement by Prudential, Applicant shall furnish an Agreement, in form acceptable to Prudential, from the Ramada Hotel Corporation (herein called the "Franchisor") wherein:

(i) the Franchisor certifies the Mortgaged Premises are acceptable and are being operated under the Franchise Agreement.

(ii) the Franchisor agrees to give Prudential copies of notice of default.

(iii) the Franchisor grants Prudential, its successors or assignees a period of 30 days within which to begin to cure defaults by the Franchisee which are curable and, as to those defaults which are not curable, allows Prudential, its successors or assignees to proceed to foreclose its lien and will, thereafter, upon request, reinstate the Franchise without charge if such is suspended prior to foreclosure.

(iv) the Franchisor agrees that, in the event of foreclosure, the Prudential, its nominee, or a third party foreclosure purchaser (who is otherwise acceptable to the Franchisor) shall be permitted, at the option of Prudential or such purchaser, to operate the Mortgaged Premises under the Franchise without payment of an additional franchise or transfer fee. If such option is not exercised by Prudential or such purchaser, it shall have no liability under such Franchise Agreement.

The form and substance of the Franchise Agreement between Applicant and the Ramada Hotel Corporation covering the Mortgaged Premises shall be subject to the approval of Prudential, and shall be in full force and effect and free from default by either party on the Closing Date The Franchise Agreement shall be subordinate to Prudential's Mortgage.

24. Reserve for Replacement

(a) Mortgagor shall deposit monthly an amount in an escrow account, maintained at a bank satisfactory to Prudential, to provide a cumulative reserve for the replacement of furniture, fixtures, and equipment, including individual room, lobby, and banquet room furniture, carpets and drapes, and related hotel operating equipment. Such amount shall equal: 2% of the previous month's gross revenues during the first year of the loan; 2.5% of the previous month's gross revenues during the second year of the loan; and 3% of the previous month's gross revenues in every year of the loan thereafter. Prudential reserves the

right to require verification of the escrow account balance from time to time and the right to institute such controls as it deems necessary to assure that the expenditure of escrow funds satisfies the intent of the replacement reserves requirement.

(b) Mortgagor acknowledges that Prudential shall be granted a security interest in said escrow account and agrees to execute any and all documents, agreements or notices deemed necessary by Prudential in order to evidence Prudential's security interest in said escrow account. All funds held in such escrow account shall be payable to Prudential upon demand following a default under the loan documents which entitled Prudential to, and based on which, Prudential has accelerated the Loan.

25. Contingent Interest

In addition to the fixed interest rate of 14.0% per annum, Mortgagor, within 90 days after the end of each fiscal year, shall pay Prudential annually, as additional interest on the total indebtedness, a sum equal to 2.0% of the gross annual revenue as herein defined.

In no event shall the additional interest payable under this provision, when added to other required interest charges exceed the maximum interest rate permitted by the laws of the state in which the Mortgaged Premises are located. In the event the Note is paid in full on some date other than the last day of the fiscal year, the payment due under this provision shall be on a

pro-rated basis of such partial fiscal year. Nothing herein shall be deemed to create a joint venture or partnership between Prudential and Mortgagor, it being the intent of the parties that only the relationship of Mortgagee and Mortgagor shall be established.

As used herein, "gross annual revenue" shall mean all income due or received by the Mortgagor, or any operator or lessee, during the fiscal year from the operation of the Mortgaged Premises.

26. Equity Requirements

Prior to the Closing Date, Applicant shall furnish to Prudential a certified financial statement of the Applicant prepared in accordance with generally accepted accounting principles and certified to within 30 days of the Closing Date by an independent public accounting firm acceptable to Prudential showing limited partners have contributed not less than $1,500,000 to acquire not more than 99% of the partnership interests.

ESCROW AGREEMENT

(Please note any bracketed information in the following Escrow Agreement was handwritten in and approved by the parties to this agreement.)

This Escrow Agreement made this [12th] day of December, 1984, by and among THE PRUDENTIAL INSURANCE COMPANY OF AMERICA ("Lender"), [THE CITIZENS & SOUTHERN NATIONAL BANK OF SOUTH CAROLINA] ("Agent"), FRANCIS MARION HOTEL, INC. ("Seller"), and HOSPITALITY ASSOCIATES OF CHARLESTON, a New York limited partnership ("Borrower").

WITNESSETH:

WHEREAS, heretofore, pursuant to that certain Purchase Agreement (the "Purchase agreement") executed by Seller on September 19, 1984, Seller agreed to sell to Hecht & Stoler, Inc., and Hecht & Stoler, Inc., agreed to purchase from Seller, that certain real and personal property known as the Francis Marion Hotel, Charleston, South Carolina (the "Hotel"); and

WHEREAS, Hecht & Stoler, Inc. subsequently assigned its rights under and interest in the Purchase Agreement to Borrower; and

WHEREAS, Lender, pursuant to its Loan Commitment dated October 26, 1984 (the "Commitment"), agreed to disburse the principal sum of Six Million Dollars ($6,000,000.00) ("the Loan") to Borrower to finance Borrower's acquisition of the Hotel, upon the terms and conditions set forth therein, which terms and conditions

include the requirement that Borrower furnish to Lender a surety bond [in form acceptable to lender pursuant to the Commitment], (the "Bond") to secure the payment of rent under that certain lease agreement (the "NAC Lease") dated as of January 9, 1982, between Seller and National Acceptance Company of America ("NAC"); and

WHEREAS, Lender imposed such requirement for the reason that the rent due under the NAC Lease is for the use at the Hotel of certain items of personal property (collectively, the "Equipment") owned by NAC and subject to recorded Financing Statements in favor of NAC; and

WHEREAS, Seller and Borrower have agreed that Seller will obtain the Bond or make other financing arrangements which induce NAC to release its [first security lien on] [~~Financing Statements covering~~] the Equipment and that Seller and Borrower will share equally the cost thereof; and

WHEREAS, Seller has been unable to obtain the Bond or to make such other financial arrangements as of this date, despite its diligence; and

WHEREAS, Seller and Borrower desire to have the Loan disbursed in accordance with the terms and conditions of the Commitment at the present time and Lender is willing to disburse the amount thereof, provided however, that the sum of [Nine Hundred Fifty Thousand Eight Hundred Four and 38/100 $950,804.38] [~~One Million~~] Dollars [(~~$1,000,000.00~~)] is deposited with Agent immediately upon disbursement of such proceeds by Lender and to be held by Agent as the Escrow Deposit (as

defined hereinafter) in accordance with the terms hereof; and

WHEREAS, Seller and Borrower are willing to accept such conditions of disbursement of the Loan and hereby covenant and agree that upon disbursement of the full loan proceeds by Lender Borrower will immediately deposit the sum of [Nine Hundred Fifty Thousand Eight Hundred Four and 38/100 $950,804.38] [~~One Million~~] Dollars [(~~$1,000,000.00~~)] with Agent; and

WHEREAS, Agent is willing to accept the conditions and obligations imposed on it by this Agreement.

NOW, THEREFORE, in consideration of the foregoing, of the mutual covenants and promises contained herein, to induce Seller to sell the Hotel to Borrow and Lender to make the Loan to Borrower, and for other good and valuable consideration, the receipt (where applicable) and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, the parties agree as follows:

1. Lender shall disburse to Borrower the sum of Six Million Dollars ($6,000,000.00) upon or after compliance with all of the terms and conditions of the Commitment except for the provision of the bond described above, and immediately thereafter Borrower shall deposit [Nine Hundred Fifty Thousand Eight Hundred Four and 38/100] [~~One Million~~] Dollars [$950,804.38] [(~~$1,000,000.00~~)] with Agent to be administered in accordance herewith. As between themselves, Borrower and Seller agree that the Escrow Deposit is held for the benefit of Seller, and that Borrower's sole interest therein is that the Escrow Deposit be used as provided herein to

avoid default of the Loan due to a payment default under the NAC Lease.

2. Borrower and Seller shall continue to pursue diligently and at their own expense efforts to obtain the Bond or to make other financial arrangements acceptable to NAC.

3. The Escrow Deposit, or so much thereof as exists at such time, shall be paid by Agent to Seller upon any of the following conditions:

(a) the receipt by Agent of instructions from Lender to do so, which instructions will be given promptly after Lender has received the Bond; or

(b) the receipt by Agent of confirmation from Lender or Lender's Charleston, South Carolina, attorneys in connection with this transaction, Messrs. Young, Clement & Rivers, that all Financing Statements in favor of NAC with respect to the Equipment have been released, terminated, or expired; which confirmation shall be given promptly upon the receipt by Lender or such attorneys, as the case may be, of UCC-4's certified by the R.M.C. for Charleston County and by the South Carolina Secretary of State evidencing no valid Financing Statements in favor of NAC with respect to any of the Equipment, or promptly upon the receipt of either of them of such information and/or materials as they deem satisfactory to evidence the termination, release, or expiration of such Financing Statements [and that NAC has fully released its status as a lienholder and is willing to grant Lender a first lien status as to all Equipment]; or

(c) such other terms and conditions as Lender may establish.

4. Until such time as it is disbursed to Seller in accordance herewith, the Escrow Deposit may be used to pay any defaulted rental obligations under the NAC Lease. Such payments shall be made by Agent upon its receipt of written instructions from Lender to do so, and Agent may act solely in reliance on such instructions without regard to any information or demand then received by it. Lender shall give no such instructions until the occurrence of a rental [or a default of any obligation capable of being cured by the payment to NAC] default under the NAC Lease. Agent's cancelled check shall evidence receipt of such payment. Agent shall use its best efforts to provide to Borrower and Seller a copy of its transmittal of such payment and a copy of such instructions from Lender promptly upon Agent's receipt thereof.

5. Lender agrees that it will not declare the Loan to be in default solely due to a default in a rental payment under the NAC Lease which is cured by a disbursement from the Escrow Deposit.

6. Agent shall deposit the Escrow Deposit in a [Federated Master Trust] account [, ~~to be maintained at ___~~] and Lender, Borrower, and Seller agree that such account is prudent in all respects for the transactions contemplated by this Agreement. The term Escrow Deposit shall mean the amount in such account, as the same may fluctuate due to payments, interest credits, etc. The only interest to be paid with respect to the Escrow Deposit

shall be that credited by such depositary [sic] in accordance with the terms of such account.

7. Once Agent has received instructions to pay the Escrow Deposit to Seller, Agent shall abide by Seller's request with respect to the timing of such payment in order to maximize the amount of interest credited to such account.

8. Borrower and Seller agree to be liable, jointly and severally, to Agent for the payment of its costs and reasonable fees for serving as such. As between themselves, Borrower and Seller shall split equally such costs and fees.

9. No waiver of any obligation or requirement of Borrower or Seller hereunder shall be valid unless in writing, signed by Lender, and no waiver shall at any time be deemed to be a waiver of the same or any other obligation or requirement hereunder which may thereafter accrue.

10. Whenever in this Escrow Agreement notice shall be required or permitted to be given, such notice shall be given by personal delivery or by any form of U.S. Mail providing a signed receipt therefor. Such notice will be deemed given on the earlier of the date of actual receipt or the third (3d) business day following the date the same is deposited in the United States mail, postage prepaid. Notices shall be addressed as follows:

If to Lender:

The Prudential Insurance Company
of America
Atlanta Real Estate Investment Office
Suite 900, 2200 Century Parkway, N.E.
Atlanta, Georgia 30345
Attn: _____

If to Agent:

[The Citizens & Southern National Bank of South Carolina
48 Broad Street
Charleston, S.C.
Attn: Trust Department]

If to Borrower:

Hospitality Associates of Charleston
c/o First Hospitality Services, Inc.
9 East 41st Street
Suite 202
New York, New York 10017

If to Seller:

Francis Marion Hotel, Inc.
c/o Julian R. Youmans, M.D.
3542 Greenview Drive
El Macero, California 95628

or to such other address as the parties hereto may from time to time designate in writing in lieu thereof.

11. This Escrow Agreement may be executed in multiple counterparts, each of which shall constitute an original and all of which shall constitute a single instrument.

12. This Escrow Agreement shall be binding on the parties hereto and their respective heirs, successors, and assigns.

IN WITNESS WHEREOF, the parties have caused the within Agreement to be duly executed and delivered this [12th] day of December, 1984.

WITNESSES:

As To Lender:
/s/ William J. Bates
/s/ Randall S. Stephens

As To Agent:
/s/ William J. Bates
/s/ Randall S. Stephens

As To Borrower:
/s/ Mark Bourten
/s/ William J. Bates

As To Seller:
/s/ Sandra L. Randleman
/s/ M. Craig Garner, Jr.

Lender:
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
By: /s/ Neil Freedland
Its: [Associate Investment Manager]

Agent:
[Citizens & Southern Nat'l Bank of S.C. as Agent by Stephen S. Bowen, V.P.-Senior Trust Officer]

Borrower:
HOSPITALTIY ASSOCIATES OF CHARLESTON,
a New York limited partnership
By: /s/ Martin Hecht
Its: General Partner

Seller:
FRANCIS MARION HOTEL, INC.
By: /s/ Julian R. Youmans
Its: President

ESCROW AGREEMENT

THIS ESCROW AGREEMENT, made this 12th day of December, 1984, by and among THE PRUDENTIAL INSURANCE COMPANY OF AMERICA ("Lender"), THE CITIZENS AND SOUTHERN NATIONAL BANK OF

SOUTH CAROLINA ("Agent"), HOSPITALITY ASSOCIATES OF CHARLESTON, A New York Limited Partnership ("Borrower"), and FRANCIS MARION HOTEL, INC. ("Seller").

WITNESSETH:

WHEREAS, Lender, pursuant to its loan commitment dated October 26, 1984 (the "Commitment"), has agreed to loan to the Borrower Six Million Dollars ($6,000,000.00) (the "Loan") to finance Borrower's acquisition of the Francis Marion Hotel, Charleston, South Carolina (the "Hotel"), from Seller, upon the terms and conditions set forth therein, which terms and conditions include the requirement that Borrower furnish to Lender a franchise agreement with Ramada Inns, Inc. (the "Franchise Agreement"); and,

WHEREAS, as a condition of granting said Franchise Agreement, Ramada Inns, Inc. ("Ramada") and Lender have required that Borrower deposit the sum of One Hundred Fifty Thousand Dollars ($150,000.00) to cover the cost of necessary improvements, changes and upgrades to the Hotel, in accordance with Exhibit "A" attached hereto, in order to obtain and maintain the Franchise Agreement; and,

WHEREAS, Lender, Seller and Borrower desire to have the Loan disbursed in accordance with the terms and conditions of the Commitment at the present time, and Lender is willing to disburse the amount thereof, provided, however, that the sum of One Hundred Fifty Thousand Dollars ($150,000.00) is deposited with Agent immediately upon disbursement of such proceeds by

Lender, and to be held by Agent as the Escrow Deposit (as defined hereinafter), in accordance with the terms hereof; and,

WHEREAS, Lender, Seller and Borrower are willing to accept such conditions of disbursement of the Loan, and Seller and Borrower have agreed, by letter of even date, to fund the Escrow Deposit, and Lender, Seller and Borrower hereby covenant and agree that upon disbursement of the full Loan proceeds by Lender, the Seller and Borrower will immediately deposit the sum of One Hundred Fifty Thousand Dollars ($150,000.00) with Agent; and,

WHEREAS, Agent is willing to accept the conditions and obligations imposed on it by this Agreement.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and promises contained herein, to induce Lender to make the Loan to Borrower, and for other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby the parties agree as follows:

1. Lender shall disburse to Borrower the sum of Six Million Dollars ($6,000,000.00) upon or after the compliance of all of the terms and conditions of the Commitment, and immediately thereafter Borrower and Seller shall deposit One Hundred Fifty Thousand Dollars ($150,000.00) with Agent to be administered in accordance herewith. As among themselves, Borrower, Seller and Lender agree that the Escrow Deposit is to be held for the benefit of Borrower, Seller and Lender in accordance herewith.

2. The Escrow Deposit, or so much thereof as exists at such time, shall be paid by Agent to Borrower upon any of the following conditions:

A. The receipt by Agent of instructions from Lender to release certain sums, which instructions will be given promptly after Lender has received proof reasonably acceptable to Lender that such funds are necessary to be expended in accordance with the Franchise Agreement and Exhibit "A"; and/or,

B. Such other terms and conditions as Lender may reasonably establish.

3. Funds may be withdrawn from the Escrow Deposit, as provided in paragraph 2 above, no more frequently than one (1) time per month.

4. Any funds remaining in the Escrow Deposit and not disbursed by June 1, 1985, shall immediately be delivered to the Lender, unless proof is provided to Lender indicating that Ramada has extended the time of performance pursuant to the Franchise Agreement and Exhibit "A".

5. Upon appropriate certification by Ramada that all repairs, upgrades and changes have been completed, or, in the alternative, should a substitute franchisee approved by Lender replace Ramada, lender shall instruct Escrow Agent to return any excess funds in the Escrow Deposit to Borrower and Seller.

6. Agent shall deposit the Escrow Deposit in a Certificate of Deposit or such other fund which matures every thirty (30) days. The term "Escrow Deposit" shall mean the amount in such account, as the same may

fluctuate due to payments, interest credits, etc. The only interest to be paid with respect to the Escrow Deposit shall be that credited by such depository in accordance with the terms of such account. Borrower and Seller shall be entitled to any interest earned on the Escrow Deposit.

7. Borrower agrees to be liable to Agent for payment of its cost and reasonable fees for serving as such.

8. No waiver of any obligation or requirement hereunder shall be valid unless in writing, signed by Lender, and no waiver shall at any time be deemed to be a waiver of the same for any other obligation or requirement hereunder which may thereafter accrue.

9. Whenever in this Escrow Agreement notice shall be required or permitted to be given, such notice shall be given by personal delivery or by any form of United States Mail providing a signed receipt thereof. Such notice shall be deemed given on the earlier of the date of actual receipt or the third (3rd) business day following the date same is deposited in the United States Mail, postage prepaid. Notices shall be addressed as follows:

If to Lender:

The Prudential Insurance Company
of America
Atlanta Real Estate Investment Office
Suite 900, 2200 Century Parkway, N.E.
Atlanta, Georgia 30345
Attn: Neil Freedland

If to Agent:

The Citizens & Southern National Bank of South Carolina
48 Broad Street
Charleston, South Carolina 29401
Attn: Trust Department

If to Borrower:

Hospitality Associates of Charleston
c/o First Hospitality Services, Inc.
Nine East 41st Street, Suite 202
New York, New York 10017

[If to Seller:

c/o Julian R. Youmans, M.D.
P.O. Box 5167
El Macero, California 95618]

or to such other addresses as the parties hereto may from time-to-time designate in writing in lieu thereof.

10. This Escrow Agreement shall be binding on the parties hereto and their respective heirs, successors and assigns.

IN WITNESS WHEREOF, the parties have caused the within Escrow Agreement to be duly executed and delivered this 12th day of December, 1984.

Witnesses:

/s/ William J. Bates
/s/ Randall S. Stephens

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA - Lender
By: /s/ Neil Freedland
Its: [Associate Investment Manager]

/s/ William J. Bates
/s/ Randall S. Stephens

THE CITIZENS AND SOUTHERN NATIONAL BANK OF SOUTH CAROLINA - Agent
By: /s/ Stephen D. Bowen
Its: V P & Senior Trust Officer

/s/ William J. Bates
/s/ Mark Bolten

HOSPITALITY ASSOCIATES OF CHARLESTON, a New York Limited Partnership – Borrower
By: /s/ Martin Hecht
Its: General Partner

/s/ Charles W. Connelly
/s/ M. Craig Garner, Jr.

FRANCIS MARION HOTEL, INC. – Seller
By: /s/ Julian R. Youmans
Its: President

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JULIAN R. YOUMANS, Plaintiff, vs. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, HOSPITALITY ASSOCIATES OF CHARLESTON, MARTIN HECHT, and JEFFREY STOLER, Defendants.	)	CIVIL ACTION FILE NO. 2:88-1258-1

* * *

Deposition of BARBARA GAMBILL, taken on behalf of the Plaintiff, pursuant to the stipulations agreed to herein, before Joy P. Lunel, RPR, Certified Court Reporter and Notary Public, at One Ravinia Drive, Suite 1400, Atlanta, Georgia, on the 22nd day of June, 1989, commencing at the hour of 3:00 p.m.

* * *

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Atlanta, Georgia 30318
(404) 351-0300

CROSS-EXAMINATION

* * *

[p. 5] Would you briefly describe on the record what your position is at Prudential and how long you've been here.

A I'm Associate Manager; I've been with Prudential 35 years.

Q Associate Manager?

A Uh-huh (affirmatively).

Q In what department?

A Mortgage Capital Company.

Q Thank you. Now, would you describe briefly what your duties are in that capacity.

A Yes. I do collection work to some extent; we do statements; we service all the loans. We have over 500 loans that we service in various aspects. We put together new cases that come in from mortgagors for new loans. I analyze leases; I'm in charge of securities; I handle 608 loans and the reserve for replacement accounts on those.

* * *

[p. 20] (Plaintiff's Exhibit 102

Q This is headed a Mortgage Record, Hospitality Associates. Can you find a date on there quicker than I can?

A Date of the mortgage?

Q Of the form.

A Of the form? No.

Q Are they undated?

A That's right.

Q Okay, what is that, a computer record?

[p. 21] A It's a microfiche of the mortgage record, and this is what they used before they went on the new system. We can take it off the computer now, we have access to it.

Q If I wanted to read that and find out the status of the loan, how do I determine what these codes say?

A Well, we have a code book if you want the codes.

Q Do you know –

A Most of us know what, you know, the date it was received. This is a loan number –

* * *

The second number in columns, which it looks like a, what is that, seven-digit number?

A Yeah, seven-digit number.

Q What does that represent, the loan number?

A The loan number, see.

Q All right, what's the next column?

A That's the transaction date.

Q All right, so the last one on there would be what?

A That's the date – this is the year, 5 is the year, 2 is the month, and 13 is the day. It's [p. 22] backwards, it's 1985, 2/13/85.

Q All right.

A See, they have different things. The next code we would read would be – this is the due date, January '85.

Q All right, let me clear this up so I can read it later. The date that you're pointing to begins with an F, that's F8501?

A Yes.

Q And what does that mean?

A January '85. These payments are due on the first day of the month. That's January, this is the first of January. That's February. The next figure here that you see is the interest payment.

Q All right.

A The next figure is the principal payment. The last figure is the outstanding principal balance.

Q All right, in this case that's what? Read that number for me, please.

A 5,997,749.96.

Q All right. And what other codes can you decipher for me, or what do you normally look for or use?

A Well, down here you've got a balance due on something.

[p. 23] Q All right, that's what we need to know. What is that?

A This is telling me that on the January 1st, 1985, payment there's a balance due of $2,250.

Q And that's on the mortgage payment to Prudential that that's due? That's all that's reflected on this form; right?

A That's right. No reserve would be on here.

Q Okay. Now, does the second page of that document read the same way as what you just demonstrated?

A Uh-huh, that's correct.

Q All right. Look at the next page and make sure it's the same.

A They're showing a balance due on the 4/1/86 payment is reflected here.

Q Does that form carry any designation for a problem loan, if it is one?

A No.

Q There's no particular system built in?

A No, other than this right here (indicating).

Q What is that?

A 13100 status.

Q What does that mean?

A That means it's in collection, that it's in [p. 24] default.

Q And 13100 is an accounting number or something?

A Well, we used to have cards, they were called 13100's, and that's how we kept our records. We would get notification of a payment and we would post our cards, and that's what they were called, 13100's, and that's how we kept up with how they were making their payments, how current, you know. Also, we would –

Q Before we leave that, where it shows 13100 status, what designation tells you it's in collection? Is it the RR under that or what?

A No, that's – this stands for reserve for replacement account. This is the total deposit; this is the total payment; that's hazard insurance, taxes. They insert those things up here, but, no, this 13100 means it's in collection, the designation 13100.

Q What's on there if it's not in collection?

A Nothing.

Q Just nothing appears there?

A That's right.

Q How about telling me – you just mentioned reserve and hazard and all that. Read across what's reflected on this form in each of those categories, if you would, please.

[p. 25] A There's nothing reflected.

Q So there is no reserve fund and there's no hazard fund?

A No.

Q They just have that heading preprinted on the top of the form?

A That's right, it's on all of them, yes, sir.

Q Okay. Can you look at that form and tell when that account became a 13100 account status?

A Looks like it started about October 1985.

Q All right, and can you tell me how you determined that looking at that form?

A It starts here (indicating). Here half the entries are October 1985. It keeps repeating that, balance due.

Q Can I ask you a question?

A Certainly.

Q When you say it keeps repeating that balance due, you're telling me it keeps repeating that balance due for October?

A No, it keeps repeating that same due date. See October '85, October '85, October '85, and then over here it was October '85. I'm just trying to be sure we're not repeating information, and I don't think so. See, it starts down here.

[p. 26] Q Can you tell from that form, if it started in October of '85, how long it stayed that way, at least through the time on that one form?

A Well, through '86, April.

Q April of '86, okay.

[p. 1220] Portion of Jury Charge From Trial

* * *

I WILL FIRST INSTRUCT YOU ON THE BREACH OF CONTRACT CLAIM. IN THIS CASE THE PLAINTIFFS DO NOT CLAIM THAT THEY ARE A [p. 1221] PRIMARY PARTY TO A CONTRACT WITH THE DEFENDANTS, BUT THAT THEY ARE THE THIRD-PARTY BENEFICIARIES TO THE CONTRACT. I CHARGE YOU THAT PARTIES MAY ENTER INTO A CONTRACT WITH THE INTENT TO THE BENEFIT OF A THIRD PARTY, AND IN THAT EVENT THE THIRD PARTY HAS A RIGHT TO ENFORCE THE CONTRACT IF HE DERIVED BENEFIT, EVEN THOUGH HE WAS NOT NAMED AS A PARTY IN THE CONTRACT.

WHERE A THIRD PARTY ELECTS TO AVAIL HIMSELF OF A CONTRACT ENTERED INTO BETWEEN OTHERS FOR HIS BENEFIT, HE MAKES THE CONTRACT HIS OWN AND MUST BEAR THE BURDEN AS WELL AS REAP THE BENEFITS THAT PROPERLY BELONG TO HIM AS A PARTY TO THE CONTRACT. HIS RIGHTS DEPEND UPON AND ARE MEASURED BY THE TERMS OF THE CONTRACT.

IN ORDER FOR THE PLAINTIFFS TO PROVE THE DEFENDANTS ARE LIABLE FOR BREACH OF CONTRACT, THEY MUST SHOW:

ONE, THE EXISTENCE OF A CONTRACT.

TWO, THAT UNDER THE CONTRACT PLAINTIFFS HAVE A RIGHT TO THE RENDITION OF SOME PERFORMANCE BY DEFENDANTS.

THREE, THAT THE DEFENDANTS BREACHED THE CONTRACT.

AND, FOUR, THAT THE PLAINTIFFS WERE DAMAGED AS A RESULT OF THE BREACH OF THE CONTRACT.

YOU MUST FIRST DETERMINE THE EXISTENCE OF A CONTRACT. A CONTRACT IS AN AGREEMENT BETWEEN TWO OR MORE PARTIES FOR THE DOING OR NOT DOING OF SOME SPECIFIED THING OR THINGS.

IN THIS CASE THE PARTIES DIFFER AS TO THE TERMS OF THE CONTRACT. THE DEFENDANTS CONTEND THAT THE DOCUMENTS SIGNED AT [p. 1222] THE CLOSING ON DECEMBER 12, 1984, WERE THE FINAL EXPRESSION OF THE AGREEMENT BETWEEN THE PARTIES AND WAS AN INTEGRATED AGREEMENT WHICH COULD NOT BE CONTRADICTED BY EVIDENCE OF PRIOR AGREEMENTS BETWEEN THE PARTIES.

AN INTEGRATED AGREEMENT IS A WRITING OR WRITINGS CONSTITUTING A FINAL EXPRESSION OF ONE OR MORE TERMS OF AN AGREEMENT. WHERE THE PARTIES REDUCE AN AGREEMENT TO WRITING, WHICH IN VIEW OF THE COMPLETENESS AND SPECIFICITY APPEARS TO BE A COMPLETE AGREEMENT, IT IS TAKEN TO BE AN INTEGRATED AGREEMENT UNLESS IT IS ESTABLISHED BY OTHER EVIDENCE THAT THE WRITING DID NOT CONSTITUTE A FINAL EXPRESSION.

IT IS UP TO YOU TO DETERMINE WHETHER THE DOCUMENTS SIGNED AT THE CLOSING ON DECEMBER 12TH CONSTITUTED AN INTEGRATED AGREEMENT WHICH WAS THE FINAL EXPRESSION OF THE TERMS AGREED UPON IN THIS CASE. IF YOU DETERMINE THAT THE DOCUMENTS SIGNED AT THE CLOSING CONSTITUTED AN INTEGRATED AGREEMENT, YOU MAY NOT CONSIDER ANY PRIOR AGREEMENT OF THE PARTIES, BUT MUST DETERMINE THE RIGHTS AND OBLIGATIONS OF THE PARTIES BASED SOLELY ON THE DOCUMENTS SIGNED ON DECEMBER 12TH.

ONLY IF YOU DETERMINE THAT DOCUMENTS SIGNED AT THE CLOSING DID NOT CONSTITUTE THE FINAL AGREEMENT BETWEEN THE PARTIES, YOU MUST DETERMINE WHAT CONSTITUTED THE FINAL AGREEMENT BETWEEN THE PARTIES. IN DETERMINING THIS, YOU MUST KEEP IN MIND WHERE INSTRUMENTS ARE ENTERED INTO BY THE SAME PARTIES AT DIFFERENT TIMES RELATING TO THE SAME SUBJECT MATTER, THE [p. 1223] INSTRUMENTS MAY BE CONSTRUED TOGETHER TO DETERMINE THE ENTIRE AGREEMENT BETWEEN THE PARTIES. WHERE A LATER AGREEMENT IS INCONSISTENT WITH A PREVIOUS AGREEMENT, THE LATER AGREEMENT GOVERNS.

THE PURPOSE OF ALL RULES OF CONTRACT CONSTRUCTION IS TO DETERMINE THE PARTIES' INTENTION. YOU, AS THE SOLE JUDGES OF THE FACTS, ARE TO ATTEMPT TO ASCERTAIN THIS

INTENTION IN ORDER TO DETERMINE THE SITUATION OF THE PARTIES, AS WELL AS THEIR PURPOSES, AT THE TIME THE CONTRACT WAS ENTERED INTO.

THE INTENTION OF THE PARTIES MUST BE INFERRED FROM THE WHOLE AGREEMENT AND NOT FROM SEGMENTS OF CERTAIN DOCUMENTS TAKEN OUT OF CONTEXT.

YOU HAVE HEARD THE TERM REASONABLE TIME USED IN THE CONTEXT OF THIS CASE. WHAT IS REASONABLE TIME IS A QUESTION OF FACT FOR YOU TO DETERMINE BASED ON THE EVIDENCE IN THIS CASE. WHEN A CONTRACT IS REDUCED TO WRITING, THE PARTIES ARE NOT PRESUMED TO HAVE UNDERTAKEN ANYTHING MORE THAN IS CONTAINED IN THE WRITING ITSELF.

IF YOU FIND THE LANGUAGE OF A CONTRACT UNAMBIGUOUS, IT IS PRSUMED [SIC] THAT THE CONTRACT EXPRESSES THE ENTIRE AND EXACT MEANING OF THE PARTIES AND ALL MATERIAL PARTS OF THE AGREEMENT HAVE BEEN EXPRESSED IN THE CONTRACT.

IF AN AGREEMENT IN WRITING ON ITS FACE APPEARS TO EXPRESS THE WHOLE AGREEMENT, ORAL AGREEMENT CANNOT BE ACCEPTED TO ADD A TERM TO THE AGREEMENT.

[p. 1224] I CHARGE YOU THAT PARTIES TO A CONTRACT ALWAYS HAVE THE RIGHT TO CHANGE THEIR OBLIGATIONS BY FURTHER AGREEMENT BEFORE PERFORMANCE UNDER THE ORIGINAL

CONTRACT. UNLESS PROVIDED FOR IN THE AGREEMENT BETWEEN THE PARTIES, A LENDER OR BORROWER MAY NOT BILATERALLY MAKE A MATERIAL MODIFICATION IN THE LOAN TO WHICH THE SELLER HAS SUBORDINATED WITHOUT KNOWLEDGE AND CONSENT OF THE SELLER TO THAT MODIFICATION IF THE MODIFICATION MATERIALLY AFFECTS THE SELLER'S RIGHTS.

ONCE YOU HAVE DETERMINED WHAT THE AGREEMENT WAS, YOU MUST DETERMINE WHETHER THE AGREEMENT WAS BREACHED BY THE DEFENDANTS. A BREACH OCCURS WHEN ONE PARTY TO A CONTRACT FAILS OR REFUSES TO PERFORM ITS OBLIGATION UNDER THE CONTRACT.

IT IS THE PRINCIPLE OF CONTRACTS THAT EVERY CONTRACT IMPOSES ON EACH PARTY A DUTY OF GOOD FAITH AND FAIR DEALING IN ITS PERFORMANCE AND ENFORCEMENT OF THE CONTRACT.

IF YOU FIND THE DEFENDANTS DID NOT BREACH A CONTRACT, THEN YOU MUST FIND FOR THE DEFENDANTS ON THIS CLAIM. IF YOUR VERDICT IS FOR THE PLAINTIFFS ON THE BREACH OF CONTRACT CLAIM, THEY YOU CONSIDER THE ISSUE OF DAMAGES, IF ANY, SUSTAINED BY THE PLAINTIFFS AS A RESULT OF THAT BREACH.

* * *

[p. 1225] PLAINTIFFS HAVE ALSO ALLEGED A CAUSE OF ACTION FOR NEGLIGENCE AGAINST THE DEFENDANT PRUDENTIAL. IN ORDER TO PROVE A NEGLIGENCE CLAIM, PLAINTIFFS MUST PROVE THAT:

THE DEFENDANT OWED A DUTY OF CARE TO THE PLAINTIFFS.

AND, THAT THE DEFENDANT BREACHED THAT DUTY BY A NEGLIGENT ACT OR OMISSION.

AND THAT THE PLAINTIFF WAS INJURED.

AND THAT THE DEFENDANTS' NEGLIGENCE WAS A PROXIMATE CAUSE – WAS A PROXIMATE CAUSE OF THE PLAINTIFFS' INJURY.

NEGLIGENCE. NEGLIGENCE IS THE FAILURE TO DO WHAT A REASONABLY PRUDENT PERSON WOULD HAVE DONE UNDER THE SAME OR [p. 1226] SIMILAR CIRCUMSTANCES, OR THE DOING OF SOMETHING WHICH AN ORDINARY PRUDENT PERSON WOULD NOT HAVE DONE UNDER THE SAME OR SIMILAR CIRCUMSTANCES.

OR, STATED DIFFERENTLY, IT IS THE FAILURE TO EXERCISE REASONABLE CARE UNDER ALL OF THE SURROUNDING CIRCUMSTANCES.

RECKLESSNESS. RECKLESSNESS IS AN EXTENSION OF THE CONCEPT OF NEGLIGENCE. IT MEANS

THAT THE KNOWING FAILURE TO EXERCISE REASONABLE CARE UNDER ALL THE SURROUNDING CIRCUMSTANCES.

THE TEST FOR DETERMINING WHETHER AN ACT OR FAILURE TO ACT IS RECKLESS IS WHETHER IT'S BEEN COMMITTED IN SUCH A MANNER AND UNDER SUCH CIRCUMSTANCES THAT A PERSON OF ORDINARY REASON OR PRUDENCE WOULD HAVE BEEN CONSCIOUS THAT HIS OR HER ACT OR FAILURE TO ACT WOULD INVADE THE RIGHTS OF THE PERSON OR PERSONS INJURED.

A LEGAL DUTY IS THAT WHICH THE LAW REQUIRES TO BE DONE OR FORBORNE WITH RESPECT TO A PARTICULAR INDIVIDUAL OR THE PUBLIC AT LARGE.

A DUTY TO EXERCISE REASONABLE CARE IN GIVING INFORMATION MAY EXIST WHEN THE DEFENDANT HAS A PECUNIARY INTEREST OR MONETARY INTEREST IN THE TRANSACTION.

THE RECOVERY OF DAMAGES MAY BE PREDICATED UPON A NEGLIGENTLY MADE FALSE STATEMENT WHERE A PARTY SUFFERS EITHER INJURY OR LOSS AS A CONSEQUENCE OF RELYING UPON A MISREPRESENTATION.

[p. 1227] PROXIMATE CAUSE. TALK ABOUT PROXIMATE CAUSE IS THE LEGAL TERM OF ART WHICH MEANS THE EFFICIENT OR DIRECT CAUSE, THE THING WHICH BRINGS ABOUT THE DAMAGE COMPLAINED OF.

NEGLIGENCE IS NOT ACTIONABLE UNLESS IT IS A PROXIMATE CAUSE OF THE DAMAGES COMPLAINED OF, AND IT MAY BE DEEMED A PROXIMATE CAUSE ONLY WHEN WITHOUT SUCH NEGLIGENCE THE DAMAGE WOULD NOT HAVE OCCURRED OR COULD HAVE BEEN AVOIDED.

THIS DOES NOT MEAN THAT THE LAW RECOGNIZES ONLY ONE PROXIMATE CAUSE OF DAMAGE, CONSISTING OF ONLY ONE FACT OR THING, OR THE CONDUCT OF ONLY ONE PERSON. ON THE CONTRARY MANY FACTORS OR THINGS OR THE CONDUCT OF TWO OR MORE PERSONS MAY OPERATE AT THE SAME TIME, EITHER INDEPENDENTLY OR TOGETHER, TO CAUSE DAMAGE AND IN SUCH CASE EACH MAY BE A PROXIMATE CAUSE.

IN OTHER WORDS, NEGLIGENCE, TO RENDER A DEFENDANT LIABLE FOR INJURY OR LOSS, NEED NOT BE THE SOLE CAUSE OF THE INJURY OR LOSS. IT IS SUFFICIENT THAT SUCH NEGLIGENCE, CONCURRING WITH ONE OR MORE EFFICIENT CAUSES, IS THE PROXIMATE CAUSE OF THE INJURY OR LOSS, SO THAT WHERE SEVERAL CAUSES COMBINE TO PRODUCE AN INJURY OR LOSS, A PARTY IS NOT RELIEVED FROM LIABILITY BECAUSE IT IS RESPONSIBLE FOR ONLY ONE OF THEM, IT BEING SUFFICIENT THAT ITS NEGLIGENCE IS AN EFFICIENT CAUSE WITHOUT, WITHOUT WHICH AN AND INJURY WOULD NOT HAVE OCCURRED OR COULD HAVE BEEN AVOIDED.

FORESEEABILITY OF SOME DAMAGE FROM A NEGLIGENT ACT OR OMISSION IS A PREREQUISITE

TO ITS BEING A PROXIMATE CAUSE FOR [p. 1228] THE DAMAGE FOR WHICH RECOVERY IS SOUGHT. THE STANDARD BY WHICH FORESEEABILITY IS DETERMINED IS THAT OF LOOKING TO THE NATURAL AND PROBABLE CONSEQUENCES OF THE ACT OR OMISSION ALLEGED. WHILE IT IS NOT NECESSARY THAT A DEFENDANT MUST HAVE CONTEMPLATED OR COULD HAVE ANTICIPATED THE PARTICULAR DAMAGE PRODUCING EVENT OR OCCURRENCE WHICH CAME TO PASS, IT CANNOT BE CHARGED WITH THAT WHICH IS UNPREDICTABLE OR THAT WHICH COULD NOT BE EXPECTED.

THE DEFENDANTS CLAIM THE PLAINTIFFS THEMSELVES WERE NEGLIGENT OR RECKLESS, AND THAT THEIR NEGLIGENCE OR RECKLESSNESS CAUSED OR CONTRIBUTED TO THE INJURIES OR LOSS COMPLAINED OF. THIS IS KNOWN IN THE LAW AS THE DEFENSE OF CONTRIBUTORY NEGLIGENCE OR RECKLESSNESS, AND, IF ESTABLISHED, PROVIDES A COMPLETE DEFENSE TO AN ACTION BASED ON THE DEFENDANTS' NEGLIGENCE OR RECKLESSNESS.

IN THIS CONNECTION, I CHARGE YOU THAT ALL PERSONS, INCLUDING PLAINTIFFS, ARE UNDER A DUTY TO EXERCISE REASONABLE CARE TO AVOID INJURY OR LOSS TO THEMSELVES AS WELL AS OTHERS. A PLAINTIFF'S FAILURE TO EXERCISE REASONABLE CARE UNDER ALL OF THE SURROUNDING CIRCUMSTANCES, WHICH DIRECTLY AND PROXIMATELY CAUSES OR CONTRIBUTES TO INJURY OR LOSS COMPLAINED OF, BARS ANY RECOVERY FOR THE DEFENDANTS' NEGLIGENCE.

IT IS THE DEFENDANTS' BURDEN, AND THIS CASE PRUDENTIAL'S BURDEN, TO PROVE THAT PLAINTIFFS WERE CONTRIBUTORILY NEGLIGENT BY A PREPONDERANCE OF THE EVIDENCE.

THE EFFECT OF THE PLAINTIFFS' CONTRIBUTORY NEGLIGENCE [p. 1229] IS TO BAR ANY RECOVERY FOR THE DEFENDANT'S NEGLIGENCE. MERE CONTRIBUTORY NEGLIGENCE, HOWEVER, PRESENTS NO BAR WHERE THE DEFENDANTS' CONDUCT RISES TO THE LEVEL OF RECKLESSNESS.

ACCORDINGLY, IF YOU SHOULD FIND THAT PLAINTIFFS WERE CONTRIBUTORILY NEGLIGENT, BUT THAT THE DEFENDANT WAS RECKLESS, THE PLAINTIFFS WOULD NONETHELESS BE ENTITLED TO RECOVER. BUT IF THE PLAINTIFFS' CONDUCT ROSE TO THE LEVEL OF CONTRIBUTORY RECKLESSNESS, HE WOULD BE COMPLETELY BARRED FROM ANY RECOVERY.

* * *

[p. 1243] THE COURT: ANYTHING FURTHER FROM THE DEFENDANTS?

MR. BENNETT: YOUR HONOR, I JUST WANT TO NOTE FOR THE RECORD OUR OBJECTION TO THE C & S CHARGE.

THE COURT: OKAY.

MR. BENNETT: AND ALSO OBJECT TO JUST SIMPLY READING THE STATUTE ON THE CHARGE RATHER THAN PLAINLY TELLING THE JURY THAT OUR PARAGRAPH 30 WAS VALID AND ENFORCEABLE.

THE COURT: OKAY.

MR. BENNETT: ALSO, YOUR HONOR, I OBJECT TO THE COURT [p. 1244] GIVING ANY NEGLIGENCE CHARGE AT ALL IN THIS CASE WHEN THE RIGHTS AND OBLIGATIONS OF THE PARTIES WERE DEFINED BY CONTRACT THAT WERE ENFORCEABLE AS A MATTER OF LAW.

AND FAILURE TO CHARGE OUR FUTURE ADVANCE CLAUSE IN ADDITION TO THE OTHER OBJECTIONS. THANK YOU.

THE COURT: WHAT WAS THE LAST ONE?

MR. BENNETT: FAILURE TO CHARGE THE JURY THAT OUR FUTURE ADVANCE CLAUSE WAS VALID AND ENFORCEABLE.

* * *